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## Expert Services and the Indigent Criminal Defendant: The Constitutional Madate of *Ake v. Oklahoma*

John M. West  
*University of Michigan Law School*

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## Expert Services and the Indigent Criminal Defendant: The Constitutional Mandate of *Ake v. Oklahoma*

Some thirty years ago in the landmark case of *Griffin v. Illinois*<sup>1</sup> Justice Hugo Black declared that “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”<sup>2</sup> Since that decision, the rights of indigent defendants in the criminal justice system<sup>3</sup> have received frequent attention from the Supreme Court. *Griffin* established the right to a free trial transcript for appeal. Subsequent cases required the waiver of a filing fee for appeals,<sup>4</sup> and established the right to state-supplied counsel at trial,<sup>5</sup> on appeal,<sup>6</sup> in misdemeanor cases,<sup>7</sup> and, under some circumstances, in probation revocation hearings.<sup>8</sup>

Even when an indigent defendant is provided with counsel, however, justice is not always done. As Judge Jerome Frank of the Second Circuit pointed out in an often-quoted passage, it may also be vital that the defendant have access to the assistance of experts or investigators:

The best lawyer in the world cannot competently defend an accused person if the lawyer cannot obtain existing evidence crucial to the defense,

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1. 351 U.S. 12 (1956).

2. 351 U.S. at 19.

3. In 1971, according to F.B.I. reports, of some seven million adult felony and nontraffic misdemeanor arrests in the United States, almost 3.4 million of the defendants were indigent and required appointed counsel. N. LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR 3 n.4 (1982). In 1963, the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice cited estimates that about sixty percent of the defendants in state and federal courts were unable to afford counsel. REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 16 (1963) [hereinafter cited as POVERTY AND THE ADMINISTRATION OF JUSTICE]. Another estimate is that “[i]n most jurisdictions, approximately 60-70 percent of all felony defendants and 30-40 percent of all misdemeanor defendants will be classified as indigent.” H. KERPER, INTRODUCTION TO THE CRIMINAL JUSTICE SYSTEM 279 (J. Israel 2d ed. 1979).

4. *Burns v. Ohio*, 360 U.S. 252 (1959).

5. *Gideon v. Wainwright*, 372 U.S. 335 (1963). The Court first recognized a right to state-supplied counsel in *Powell v. Alabama*, 287 U.S. 45 (1932). Decided under the “fundamental fairness” analysis of the fourteenth amendment’s due process clause, *Powell* did not create a systematic right to appointed counsel for all indigent defendants. That was made clear a decade later by *Betts v. Brady*, 316 U.S. 455 (1942) (lack of counsel did not result in denial of due process where no special circumstances made counsel necessary). Meanwhile, *Johnson v. Zerbst*, 304 U.S. 458 (1938), had established the right to appointed counsel in federal cases under the sixth amendment. It was this sixth amendment right which the Court applied to the states in *Gideon* as part of the “selective incorporation” of the Bill of Rights into the fourteenth amendment.

6. *Douglas v. California*, 372 U.S. 353 (1963).

7. *Argersinger v. Hamlin*, 407 U.S. 25 (1972). *Scott v. Illinois*, 440 U.S. 367 (1979), limited this right to those misdemeanor cases in which imprisonment is actually imposed.

8. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Mempa v. Rhay*, 389 U.S. 128 (1967).

e.g., if the defendant cannot pay the fee of an investigator to find a pivotal missing witness or a necessary document, or that of an expert accountant or mining engineer or chemist. . . . In such circumstances, if the government does not supply the funds, justice is denied the poor — and represents but an upper-bracket privilege.<sup>9</sup>

And as early as 1929 Justice (then Chief Judge) Benjamin Cardozo had noted that “upon the trial of certain issues, such as insanity or forgery, experts are often necessary both for prosecution and for defense. . . . [A] defendant may be at an unfair disadvantage, if he is unable because of poverty to parry by his own witnesses the thrusts of those against him.”<sup>10</sup> It will hardly be disputed that, as society and the legal system have come increasingly to rely on science, the importance of the expert<sup>11</sup> has only become greater.

The gradual expansion of the rights of indigent defendants, especially during the 1960s, increasingly brought with it, therefore, the recognition that one right essential to a fair trial was that of the assistance of nonlawyer experts in appropriate cases.<sup>12</sup> On the federal level, the Criminal Justice Act of 1964,<sup>13</sup> following the recommendation of the Attorney General’s Committee on Poverty and the Administration of Federal Criminal Justice,<sup>14</sup> provided for “investigative, expert, or other services necessary for an adequate defense.”<sup>15</sup> The American Bar Association used much the same language in its 1968 *Standards Relating to Providing Defense Services*.<sup>16</sup> Scholarly com-

9. *United States v. Johnson*, 238 F.2d 565, 572 (1956) (Frank, J., dissenting).

10. *Reilly v. Barry*, 250 N.Y. 456, 461, 166 N.E. 165, 167 (1929).

11. As used in this Note, the term “expert” includes not only the professional who testifies at trial as an expert witness, but also other nonlawyers, such as investigators, who assist in the development of information or planning of strategy in the pretrial and trial stages.

12. The problem for indigents is magnified by the difficulty of obtaining expert services on a pro bono basis. According to the director of a Florida volunteer defender organization: “Competent lawyers often volunteer their help, but psychiatrists rarely do. Over the years, I have found hundreds of attorneys who have been willing to volunteer millions of dollars of their time to these defendants. I have found only three free shrinks . . . .” Sherrill, *In Florida, Insanity is No Defense*, 239 NATION 537, 555 (1984) (quoting Scharlette Holdman, of the Florida Clearing House for Justice).

13. 18 U.S.C. § 3006A (1982).

14. The “Allen Committee,” so called after its chairperson Professor Francis A. Allen, concluded that in many federal cases “the provision of adequate representation requires that a range of services, in addition to the appointment of counsel, be made available to the defense. These services include those of pre-trial investigation and those of experts such as psychiatrists, accountants, and other specialists.” POVERTY AND THE ADMINISTRATION OF JUSTICE, *supra* note 3, at 39.

15. 18 U.S.C. § 3006A(e)(1) (1982). On the practical operation of the statute, see generally Oaks, *Obtaining Compensation and Defense Services Under the Federal Criminal Justice Act*, in 1 CRIMINAL DEFENSE TECHNIQUES ch. 7 (R. Cipes ed. 1969). The question of when such services are “necessary” is discussed in Part V *infra*.

16. STANDARDS RELATING TO PROVIDING DEFENSE SERVICES § 1.5 (1968). The ABA’s Advisory Committee on the Prosecution and Defense Functions, which drew up these standards, was chaired by then Circuit Judge Warren E. Burger. Essentially the same standard is carried over into the ABA’s 1980 STANDARDS FOR CRIMINAL JUSTICE § 5-1.4 (2d ed. 1980).

mentators nearly unanimously called for recognition of the indigent's constitutional right to expert assistance where necessary.<sup>17</sup> And most states, either by statute or judicial decision, provided for expert services in certain circumstances.<sup>18</sup>

Curiously, however, the Supreme Court maintained a thirty-two year silence on the issue. Its ambiguous 1953 decision in *United States ex rel. Smith v. Baldi*<sup>19</sup> remained its final word on the question until 1985.<sup>20</sup> While in the late 1960s and early 1970s the rapid expansion of the *Griffin* equal protection principle<sup>21</sup> made it appear virtually inevitable that the constitutional right to appointed experts would soon be recognized,<sup>22</sup> the Burger Court "put on the brakes"<sup>23</sup> in 1974 with its decision in *Ross v. Moffitt*,<sup>24</sup> refusing to recognize a constitutional

17. See, e.g., Decker, *Expert Services in the Defense of Criminal Cases: The Constitutional and Statutory Rights of Indigents*, 51 CIN. L. REV. 574 (1982); Margolin & Wagner, *The Indigent Criminal Defendant and Defense Services: A Search for Constitutional Standards*, 24 HASTINGS L.J. 647 (1973); Note, *The Indigent's Right to an Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings*, 55 CORNELL L. REV. 632 (1970) [hereinafter cited as Note, *Indigent's Right to an Adequate Defense*]; Note, *Right to Aid in Addition to Counsel for Indigent Criminal Defendants*, 47 MINN. L. REV. 1054 (1963) [hereinafter cited as Note, *Right to Aid*]; Note, *Criminal Law: Indigent Defendant's Right to Independent Psychiatrist*, 7 TULSA L.J. 137 (1971); Note, *An Indigent Criminal Defendant's Right to a Psychiatric Expert*, 1984 U. ILL. L. REV. 481 [hereinafter cited as Note, *Right to a Psychiatric Expert*]; Comment, *Assistance in Addition to Counsel for Indigent Defendants: The Need For; The Lack Of; The Right To*, 16 VILL. L. REV. 323 (1970) [hereinafter cited as Comment, *Assistance in Addition to Counsel*].

18. For a list of relevant statutes and cases from forty-one states, see *Ake v. Oklahoma*, 470 U.S. 68, 78 n.4 (1985); see also N. LEFSTEIN, *supra* note 3, at apps. B, C, D (surveying state provisions for defense services); Note, *An Indigent's Constitutional Right to Expert Psychiatric Assistance: Ake v. Oklahoma*, 39 SW. L.J. 957, 965-67 (1985) (discussing variations in statutory schemes).

19. 344 U.S. 561 (1953). Relying on *McGarty v. O'Brien*, 188 F.2d 151 (1st Cir. 1951), the *Baldi* Court rejected the claim that the state had a constitutional duty to appoint a psychiatrist to make a pretrial examination of the defendant. The Court emphasized, however, that in the case before it a court-appointed psychiatrist had examined the defendant and testified as to his sanity at the time of the offense. 344 U.S. at 568. Thus, it is not clear whether under *Baldi* an indigent defendant had no right at all of access to a psychiatric expert, or whether such a right was merely limited to an examination by a "neutral" expert. *Baldi*, in any case, was decided well before the Court began its systematic expansion of the rights of indigent defendants. It was certainly "severely undercut" by the Court's decisions after *Griffin v. Illinois*, 351 U.S. 12 (1956). See *Pedrero v. Wainwright*, 590 F.2d 1383, 1390 n.6 (5th Cir. 1979) (Wisdom, J.).

20. In 1963 the Court granted certiorari on this question in *Bush v. Texas*, 372 U.S. 586 (1963), only to remand the case when Texas provided a psychiatric examination and offered to grant the defendant a new trial. Eighteen years later the question was again presented by a petition for certiorari in *Eddings v. Oklahoma*, 455 U.S. 104 (1982). See *Petition for Writ of Certiorari at 20-22, Eddings*. In granting certiorari, however, the Court limited consideration to another issue presented by the petitioner. *Eddings v. Oklahoma*, 450 U.S. 1040 (1981) (granting certiorari). While the Supreme Court was silent, numerous state and lower federal courts dealt with the issue of expert services for indigent defendants — with a wide range of results. See Annot., 34 A.L.R.3d 1256 (1970 & Supp. 1985).

21. See text at notes 64-65 *infra*.

22. See Kamisar, *Poverty, Equality and Criminal Procedure: From Griffin v. Illinois and Douglas v. California to Ross v. Moffitt*, in NATIONAL COLLEGE OF DISTRICT ATTORNEYS, CONSTITUTIONAL LAW DESKBOOK 1-79, 1-94 (1977).

23. *Id.* at 1-97.

24. 417 U.S. 600 (1974).

right to appointed counsel for discretionary review by a state supreme court.<sup>25</sup>

A decade later, the breakthrough on the issue of the indigent defendant's constitutional right to state-supplied expert services may have come with the Court's 1985 decision in *Ake v. Oklahoma*.<sup>26</sup> In an opinion joined by all but two Justices,<sup>27</sup> the Court held that an indigent defendant whose sanity at the time of the offense is to be a significant factor at trial is entitled to the assistance of a state-supplied psychiatrist for his defense.<sup>28</sup>

This Note attempts to define the boundaries of the indigent criminal defendant's constitutional right to expert assistance, in the light of *Ake v. Oklahoma*. Part I briefly reviews the *Ake* decision and examines its constitutional background. Part II inquires into *Ake*'s implications for experts other than psychiatrists and in contexts other than the insanity defense, arguing that the principles that guided the *Ake* decision have validity well beyond the facts of that case. Part III asks whether the *Ake* doctrine should be limited to capital cases. Rejecting such a limitation, it concludes that the right to expert assistance should extend as far as the right to counsel. Part IV examines the role of the expert, arguing that she must be a "defense consultant" rather than a "neutral expert." Part V addresses the threshold showing a defendant must make in order to obtain access to an expert, proposing several tests under which the right to expert assistance can be evaluated.

## I. *AKE* AND ITS CONSTITUTIONAL BACKGROUND

### A. *Ake v. Oklahoma*

Glen Burton Ake was tried and convicted in the District Court of Canadian County, Oklahoma, for the brutal and senseless murder of a husband and wife and the wounding of their two children. Captured along with his accomplice in Colorado a month after the crime, Ake made a detailed, forty-four page confession. The "facts" of the case were thus not in dispute.<sup>29</sup> The only issue at trial was Ake's sanity.

25. See Kamisar, *supra* note 22, at 1-97 to 1-110. On *Moffitt*, see notes 66-73 *infra* and accompanying text.

26. 470 U.S. 68 (1985).

27. See note 54 *infra*.

28. 470 U.S. at 83. For further discussion of the *Ake* decision, see notes 29-55 *infra* and accompanying text.

29. In his dissenting opinion Justice Rehnquist describes the crime in some detail. 470 U.S. at 88. Rehnquist's account, excerpted from Oklahoma's Supreme Court brief, see Brief of Respondent at 3-10, *Ake*, was apparently aimed at portraying the robbery and murder as a rationally planned act ("Petitioner Ake and his codefendant Hatch quit their jobs on an oil field rig in October 1979, borrowed a car, and went looking for a location to burglarize." 470 U.S. at 88), to support his argument that there was no doubt as to Ake's sanity. See 470 U.S. at 90-91. Whatever the horror of the crime, however, it is doubtful that it simply resulted from a rational calculus. Ake's confession makes clear that he committed the crime under the influence of con-

At arraignment, the judge found Ake's behavior so "bizarre" that he ordered *sua sponte* a psychiatric examination.<sup>30</sup> Following a month-long state hospital examination of his competency to stand trial, Ake was diagnosed as paranoid schizophrenic,<sup>31</sup> held incompetent to stand trial, and committed to the state hospital. Six weeks later, however, he had been rendered competent through massive doses of the antipsychotic drug Thorazine.<sup>32</sup>

At a pretrial conference, Ake's court-appointed attorney announced his intention to raise a defense of insanity. During his three months at the state hospital, Ake had never been examined with regard to his sanity at the time of the offense; because he was indigent, his attorney asked the trial court to appoint a psychiatrist for such an examination. Relying on *United States ex rel. Smith v. Baldi*,<sup>33</sup> the court rejected the request.<sup>34</sup> At trial, Ake's counsel called three psychiatrists who had examined the defendant; none of them, however,

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siderable quantities of cocaine, marijuana, whiskey, and beer he consumed that day, apparently as a result of an emotional crisis set off by his girlfriend's desertion. See Brief of Respondent, app. A at 3a-50a; cf. *The Supreme Court, 1984 Term — Leading Cases*, 99 HARV. L. REV. 120, 133 n.20 (1985) (arguing that Rehnquist misunderstood the nature of Ake's illness, and that Ake's "apparent coherence after the crime was consistent with the diagnosis of chronic paranoid schizophrenia") [hereinafter cited as *The Supreme Court, 1984 Term*].

30. Information on the pretrial and trial proceedings is drawn from *Ake*, 470 U.S. at 70-73.

31. At Ake's competency hearing, the examining psychiatrist testified that Ake was a psychotic . . . his psychiatric diagnosis was that of paranoid schizophrenia — chronic, with exacerbation, that is with current upset, and that in addition . . . he is dangerous. . . . [B]ecause of the severity of his mental illness and because of the intensities of his rage, his poor control, his delusions, he requires a maximum security facility within — I believe — the State Psychiatric Hospital system.  
470 U.S. at 71.

32. Apparently because of the drug treatment, Ake stared vacantly ahead throughout the trial, remaining mute and refusing to speak with his attorneys. *Ake v. State*, 663 P.2d 1, 6 (Okla. Crim. App. 1983). Ake also challenged, before the Supreme Court, the constitutionality of trying him while so drugged, but the Court did not reach this question in its decision. See 470 U.S. at 74 n.2.

33. 344 U.S. 561 (1953); see note 19 *supra*.

34. 470 U.S. at 72. The court's decision was fully in accord with Oklahoma law, which did not allow trial courts any discretion to provide funds for defense experts. See *Amicus Curiae Brief of the Public Defender of Oklahoma County et al.* at 4-9, *Ake*. That not only defense attorneys but also some Oklahoma courts questioned the constitutionality of this practice is indicated by the following colloquy, from a 1982 case, on a defense motion for an independent psychological evaluation:

THE COURT: You can't hire . . . investigators and you can't hire experts and all that and you talked me into — one day of ruling that again. And I think you're right on the law. And I knew — I know you're right.

But the trouble of it is, there's three fellows out there on the State Capitol that say that that's not the law. And you took it out there and they overruled . . . me . . . . And I think they're flirting with dynamite . . . .

. . . Be overruled. . . .

MR. RAVITZ: For the record, Judge, I would like to state that I don't have any funds. My client's indigent . . . .

THE COURT: Well, for whatever its [sic] worth, Ravitz . . . I agreed with you a year ago, I agree with you now . . . .

. . . I cannot legally give you those funds. And what the Supreme Court of the United States is going to say about it one of these days is another ball game. But I can't do

was able to testify on the issue of Ake's sanity at the time of the offense. Thus, Ake was able to present no expert testimony in support of his defense of insanity.<sup>35</sup> The jury rejected his claim of insanity and found him guilty on all counts. At the sentencing proceeding, the prosecution relied on testimony elicited from the psychiatrists, on cross-examination during the guilt phase, that Ake was a danger to society. Ake was able to present no expert evidence to rebut this testimony. He was sentenced to death.<sup>36</sup>

The Oklahoma Court of Criminal Appeals affirmed Ake's conviction and death sentence,<sup>37</sup> and the Supreme Court granted certiorari. Justice Marshall based his opinion for the Court on "the Fourteenth Amendment's due process guarantee of fundamental fairness."<sup>38</sup> After tracing the Court's decisions expanding the rights of indigent defendants over thirty years,<sup>39</sup> Marshall concluded that the state had an obligation to supply the indigent defendant with the "basic tools of an

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that. And the Court of Criminal Appeals told me that you can't do this. I've got to follow them. . . .

THE COURT: You've got to convince them [the Court of Criminal Appeals] out there.

That's who you've got to convince.

MR. RAVITZ: I've tried.

THE COURT: Take it on up to the Supreme Court of the United States. . . .

*Id.* at app. B.

35. While Oklahoma theoretically admitted lay testimony on the issue of insanity, the use of the M'Naghten "right-wrong" test, as well as a presumption of sanity which the defendant could overcome only by making a prima facie case of legal insanity, combined to render lay testimony virtually useless. See Amicus Curiae Brief of the Public Defender of Oklahoma County et al. at 10-17, *Ake* (citing cases); Note, *Due Process and Psychiatric Assistance: Ake v. Oklahoma*, 21 TULSA L.J. 121, 136-41 (1985) (citing cases). In light of this consistent Oklahoma practice of finding lay testimony insufficient to overcome the presumption of sanity, Justice Rehnquist's dissenting remark that Ake had called no lay witnesses to testify on his sanity, 470 U.S. at 90, is particularly inapt.

For a more general discussion of the difficulty of establishing insanity by lay testimony, see A. GOLDSTEIN, *THE INSANITY DEFENSE* 124-25 (1967) ("In practical terms, a successful defense without expert testimony will be made only in cases so extreme, or so compelling in sympathy for the defendant, that the prosecutor is unlikely to bring them at all.").

36. 470 U.S. at 72-73.

37. *Ake v. State*, 663 P.2d 1 (Okla. Crim. App. 1983). The court rejected nineteen defense exceptions, including Ake's claim that he had a right to a court-appointed psychiatrist. Its complete discussion of the issue was as follows: "We have held numerous times that, the unique nature of capital cases notwithstanding, the State does not have the responsibility of providing such services to indigents charged with capital crimes. *Irvin v. State*, 617 P.2d 588 (Okla. Cr. 1980); and cases cited therein." 663 P.2d at 6.

38. 470 U.S. at 76. Because it was able to decide the issue on due process grounds, the Court did not examine the applicability of the equal protection clause or the sixth amendment. 470 U.S. at 87 n.13.

39. The Court cited *Griffin v. Illinois*, 351 U.S. 12 (1956) (right to a trial transcript for appeal); *Burns v. Ohio*, 360 U.S. 252 (1959) (filing fee for appeal must be waived); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel at trial); *Douglas v. California*, 372 U.S. 353 (1963) (right to counsel on first direct appeal as of right); *Evitts v. Lucey*, 469 U.S. 387 (1985) (assistance of counsel must be effective); *Strickland v. Washington*, 466 U.S. 668 (1984) (same); *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (same); *Little v. Streater*, 452 U.S. 1 (1981) (right to state-paid blood tests in a "quasi-criminal" paternity action).

adequate defense or appeal.”<sup>40</sup> To determine whether access to a psychiatrist was such a “basic tool,” the Court applied the familiar three-prong balancing test of *Mathews v. Eldridge*.<sup>41</sup> The *Mathews* test considers (1) the “private interest” which would be affected by the state’s action, (2) the “governmental interest” affected by application of the additional safeguard, and (3) “the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided.”<sup>42</sup>

The Court disposed summarily of the first two factors. The criminal defendant’s interest in his life or liberty was “almost uniquely com-

40. 470 U.S. at 77 (quoting *Britt v. North Carolina*, 404 U.S. 226, 227 (1971)).

41. 424 U.S. 319, 335 (1976). The *Mathews* test is used essentially in administrative law, and its application to criminal cases is rare. *But see* *Schall v. Martin*, 467 U.S. 253, 264 (1984) (pretrial detention of juveniles); *Hewitt v. Helms*, 459 U.S. 460, 473 (1983) (prison disciplinary procedures); see also the “quasi-criminal” case of *Little v. Streater*, 452 U.S. 1, 6 (1981) (paternity action). *Ake* breaks new ground in using the *Mathews* test in the context of a criminal trial.

The *Mathews* approach of using a balancing test to take account of the cost of due process protections is controversial. For criticism of *Mathews*, see Mashaw, *The Supreme Court’s Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976); Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1136-44 (1984). On the dangers inherent in any balancing test, due to the easy manipulability of the factors to be balanced and the difficulty of comparing them, see *Barenblatt v. United States*, 360 U.S. 109, 144-45 (1959) (Black, J., dissenting); *Frantz, Is the First Amendment Law? — A Reply to Professor Mendelson*, 51 CALIF. L. REV. 729, 746-49 (1963). As Professor Rubin has pointed out, “The Court’s frequent answer is to ‘balance’ or ‘weigh’ the various factors. This reliance upon ‘weight,’ which is a useful approach for dealing with bananas, leaves something to be desired where factors such as those in *Mathews* are concerned.” Rubin, *supra*, at 1138. On the other hand, due process concepts may be more amenable to the balancing of various interests, including the cost to society. A classic characterization notes that due process “at any given time includes those procedures that are fair and feasible in the light of then existing values and capabilities.” Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 6 (1956) (emphasis added). Such an understanding of due process would seem to invite weighing the burden on society, in determining what process is due in a given situation. Generally, the Court has indeed been more willing to take account of costs when the more open-ended clauses of the Constitution are involved. *See* W. LAFAVE & J. ISRAEL, *CRIMINAL PROCEDURE* § 2.8(d) (1985).

In the area of indigent defendants’ rights, an increased willingness to consider cost appears to be part of the Court’s general retreat from *Griffin-Douglas* equal protection doctrine; *see* notes 66-73 *infra* and accompanying text. *Compare* *Mayer v. City of Chicago*, 404 U.S. 189, 196-97 (1971) (“*Griffin* does not represent a balance between the needs of the accused and the interests of society . . . . The State’s fiscal interest is . . . irrelevant.”), *with* *Scott v. Illinois*, 440 U.S. 367, 373 (1979) (“[A]ny extension [of the right to counsel] would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse States.”). *See also* Elson, *Balancing Costs in Constitutional Construction: The Burger Court’s Expansive New Approach*, 17 AM. CRIM. L. REV. 160, 183-86 (1979). Justice Stevens has argued that the *Mathews* balancing test is appropriate only to property cases and has no place where a deprivation of liberty is involved. *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 59-60 (1981) (Stevens, J., dissenting). Even if one accepts this view, however, *Ake*’s introduction of the *Mathews* analysis into the area of criminal law may be a positive step when compared to *Scott* — which considered costs as an absolute value and refused to balance them against the interests of the individual defendant. *See* Elson, *supra*, at 184; Nowak, *Foreword — Due Process Methodology in the Postincorporation World*, 70 J. CRIM. L. & CRIMINOLOGY 397, 408-09 (1979).

42. 470 U.S. at 77.



elling,”<sup>43</sup> while the state’s fiscal interest in denying the defendant the assistance of a psychiatrist was “not substantial,” both in absolute terms<sup>44</sup> and “in light of the compelling interest of both the State and the individual in accurate dispositions.”<sup>45</sup> The bulk of the Court’s discussion was devoted to the third prong, focusing on “the pivotal role that psychiatry has come to play in criminal proceedings”<sup>46</sup> and the important functions performed for the defense by a psychiatric expert.<sup>47</sup> It found that “the potential accuracy of the jury’s determination is . . . dramatically enhanced” by the provision of a psychiatric expert for the defense.<sup>48</sup> Given this determination, as well as the state and individual interests in accurate proceedings, the opinion concluded that “the State’s interest in its fisc must yield.”<sup>49</sup> Thus, the Court held that

when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.<sup>50</sup>

Turning to the special case of the sentencing phase in a capital proceeding, the Court held that “when the State presents psychiatric evidence of the defendant’s future dangerousness” as an aggravating factor, it must provide him with “access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase.”<sup>51</sup>

Finally, the Court addressed its thirty-two year old precedent of *United States ex rel. Smith v. Baldi*,<sup>52</sup> so often invoked to deny an indigent defendant’s right to expert assistance. First distinguishing *Baldi* on the grounds that in that case “neutral psychiatrists” had in fact examined the defendant and testified to his sanity, the Court went on virtually to overrule *Baldi*:

[O]ur disagreement with the State’s reliance on [*Baldi*] is more fundamental. That case was decided at a time when indigent defendants in

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43. 470 U.S. at 78.

44. The Court noted that the federal government and many states already provided psychiatric assistance for indigent defendants. 470 U.S. at 78 & n.4 (citing statutes and judicial decisions of 41 states).

45. 470 U.S. at 79.

46. 470 U.S. at 79.

47. 470 U.S. at 80-82.

48. 470 U.S. at 83.

49. 470 U.S. at 83.

50. 470 U.S. at 83. The Court limited its holding, however, by specifying that the defendant was not entitled to a psychiatrist of his choice, and that implementation of the right to a psychiatrist would be left to the states. 470 U.S. at 83. On this issue, see notes 183-89 *infra* and accompanying text.

51. 470 U.S. at 83-84..

52. 344 U.S. 561 (1953); see note 19 *supra*.

state courts had no constitutional right to even the presence of counsel. . . . [A]nd we would surely be remiss to ignore the extraordinarily enhanced role of psychiatry in criminal law today. Shifts in all these areas since the time of [*Baldi*] convince us that the opinion in that case was addressed to altogether different variables, and that we are not limited by it in considering whether fundamental fairness today requires a different result.<sup>53</sup>

Applying its discussion to the facts of the case, the Court concluded that the denial of a state-supplied psychiatrist at both the guilt and sentencing phases had deprived the defendant of due process. It reversed<sup>54</sup> and remanded for a new trial.<sup>55</sup>

### B. *The Constitutional Bases of Ake v. Oklahoma*

Judicial decisions recognizing the rights of indigent defendants have drawn their constitutional bases from several sources: the due process and equal protection clauses of the fourteenth amendment, as well as the right to counsel and other provisions of the sixth amendment. Due process, on which *Ake* was based, has until recently been a relatively little-used doctrine in the area of indigents' rights.<sup>56</sup> As *Ake* demonstrates, however, it may be of increasing importance with the Court's apparent reluctance in recent years to apply equal protection analysis.<sup>57</sup>

The most important cases based on due process, the "least frozen

53. 470 U.S. at 85 (footnote omitted).

54. Justice Marshall was joined in his opinion by Justices Brennan, White, Blackmun, Powell, Stevens, and O'Connor. Chief Justice Burger concurred in the judgment, arguing in a brief opinion that the Court's holding applied only to capital cases. 470 U.S. at 87; see Part III *infra*. Justice Rehnquist dissented, arguing that (1) the right to psychiatric assistance should exist only in capital cases; (2) the defendant should be entitled only "to an independent psychiatric evaluation, not to a defense consultant," 470 U.S. at 87; and (3) on the facts of the case, there had been no showing that Ake's sanity at the time of the offense was seriously in question. 470 U.S. at 87-92.

55. On remand Ake was again convicted of murder, despite the testimony of a defense psychiatrist who diagnosed him as "a paranoid schizophrenic who had been hearing voices since 1973." This time, however, the jury imposed only a sentence of life imprisonment. N.Y. Times, Feb. 14, 1986, at 15, col. 1 (late ed.).

The Oklahoma legislature responded to *Ake* by passing emergency legislation which (1) requires courts to provide a defense psychiatrist in insanity cases, and (2) grants the courts discretion to provide other kinds of defense experts — but only in capital cases. 1985 Okla. Sess. Law Serv. 1034-35 (West); see also *O'Malley v. Layden*, 702 P.2d 1055, 1056 (Okla. Crim. App. 1985) (holding funds for defense "experts" — with no apparent limitation to insanity or capital cases — to be payable from the court fund).

56. While *Griffin v. Illinois*, 351 U.S. 12 (1956), and *Douglas v. California*, 372 U.S. 353 (1963), can be seen in part as based on due process, see *Evitts v. Lucey*, 469 U.S. 387, 403-05 (1985); *Ross v. Moffitt*, 417 U.S. 600, 608-09 (1974), an examination of some of their progeny, which go beyond the minimum requirements of "fundamental fairness," makes clear that the dominant idea of *Griffin* and *Douglas* is the "equality principle." See, e.g., *Britt v. North Carolina*, 404 U.S. 226 (1972); *Gardner v. California*, 393 U.S. 367 (1969); *Roberts v. LaVallee*, 389 U.S. 40 (1967); *Long v. District Court of Iowa*, 385 U.S. 192 (1966).

57. See notes 66-73 *infra* and accompanying text.

concept of our law,"<sup>58</sup> antedate the "selective incorporation" of most of the Bill of Rights guarantees into the fourteenth amendment and their systematic application to the states.<sup>59</sup> Thus, the early right-to-counsel cases of *Powell v. Alabama*<sup>60</sup> and *Betts v. Brady*,<sup>61</sup> which today<sup>62</sup> would be decided on the basis of the sixth amendment right to the assistance of counsel, were based on the notion that due process required, as a matter of "fundamental fairness," the appointment of counsel — but only on a case-by-case basis, when special circumstances were present. Subsequent to the incorporation of the sixth amendment right to counsel, the due process clause has been used to establish the right to counsel in phases of the criminal justice process where the sixth amendment does not apply, such as in probation revocation proceedings.<sup>63</sup>

A second constitutional basis for the rights of indigent defendants has been the fourteenth amendment's equal protection clause. The landmark decisions of *Griffin v. Illinois*<sup>64</sup> and *Douglas v. California*<sup>65</sup> seemed to impose on the state an "affirmative duty," going beyond the minimum essentials of due process, to reduce, if not eliminate, the impact of poverty on a defendant's fate in the criminal justice system. With its 1974 decision in *Ross v. Moffitt*,<sup>66</sup> however, the Court effectively emasculated equal protection as a constitutional basis for indi-

58. *Griffin v. Illinois*, 351 U.S. 12, 20 (1956) (Frankfurter, J., concurring).

59. See W. LAFAVE & J. ISRAEL, *supra* note 41, at §§ 2.2 to 2.5.

60. 287 U.S. 45 (1932).

61. 316 U.S. 455 (1942).

62. *I.e.*, since *Gideon v. Wainwright*, 372 U.S. 335 (1963); see text at notes 74-75 *infra*.

63. See *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). The Court in *Gagnon* continued the "fundamental fairness" approach of *Powell* and *Betts* by recognizing the right to counsel only on a case-by-case basis, where counsel was necessary due to the particular circumstances of the case. See W. LAFAVE & J. ISRAEL, *supra* note 41, at § 11.1(b). In this respect *Ake v. Oklahoma* may mark a departure in "fundamental fairness" analysis under the due process clause by laying down a *per se* rule that the assistance of a psychiatrist is required in *all* cases where the defendant has made the threshold showing that her sanity will be a significant factor at trial, rather than leaving the courts to decide on a case-by-case basis whether a psychiatrist is necessary to fundamental fairness.

While the advantage of a *Powell-Betts-Gagnon* case-by-case approach is allegedly its flexibility, in fact the resistance of lower courts to procedural safeguards frequently leads to a most inflexible standard, so that the requirements for application of the safeguard are virtually never found. In *Gideon*, for example, the trial court did not apply the *Betts* "special circumstances" approach, but rather followed a flat rule that appointed counsel was to be supplied only in capital cases. 372 U.S. at 337. A better approach is therefore *Ake's per se* rule. Compare, in the ineffective assistance of counsel cases, Judge Bazelon's advocacy of *per se* rules. See *United States v. Decoster*, 624 F.2d 196, 275 (D.C. Cir. 1976) (Bazelon, J., dissenting). See generally W. LAFAVE & J. ISRAEL, *supra* note 41, at § 2.8(c).

For a survey of pre-*Ake* lower court cases on expert services decided under the due process clause, see Decker, *supra* note 17, at 581-86.

64. 351 U.S. 12 (1956) (requiring that the state provide the defendant with a trial transcript where this is necessary for the filing of an appeal).

65. 372 U.S. 353 (1963) (requiring appointed counsel on the first direct appeal as of right).

66. 417 U.S. 600 (1974) (denying a right to appointed counsel for a discretionary appeal). It is perhaps more than a coincidence that *Moffitt* came only a year after the Court had held in *San*

gents' rights independent of the due process clause.<sup>67</sup> Essentially adopting the position which Justice Harlan had advocated in his *Griffin*<sup>68</sup> and *Douglas*<sup>69</sup> dissents, *Moffitt*, as Professor Kamisar points out, "does not measure the gap between respondent and a wealthy defendant in respondent's circumstances as much as it measures respondent's opportunity to present his claim . . . against some fixed standard . . . ."<sup>70</sup> More recent cases confirm the Court's tendency to rely on due process rather than on equal protection analysis in indigents' rights cases.<sup>71</sup> And to the extent that an equal protection approach is still used, its reach seems to be defined by the due process requirement of "fundamental fairness."<sup>72</sup> The *Ake* decision, by its reliance on due process analysis to define the rights of indigent defendants, only reinforces this abandonment of equal protection doctrine.<sup>73</sup>

A final constitutional source of the rights of indigent defendants is the sixth amendment. Not only the right to counsel, but also the right to compulsory process of witnesses and the confrontation clause, can be invoked in support of the indigent defendant's right to expert assistance. In *Johnson v. Zerbst*,<sup>74</sup> the Supreme Court recognized that the sixth amendment's guarantee of the assistance of counsel meant that

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Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), that wealth was not a "suspect classification" for purposes of the equal protection clause.

67. See L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1118-19 (1978); Kamisar, *supra* note 22, at 1-97 to 1-110. It had been suggested as early as 1963 that the *Griffin-Douglas* line of cases turned essentially on a "fundamental fairness" analysis, barring only "discriminations based on wealth [which] produce such great disparity in effectiveness that they are fundamentally unfair, thus violating due process." Note, *Right to Aid*, *supra* note 17, at 1072. Such a view, which denies "that every inequality violates due process," *id.*, is difficult to reconcile with several subsequent cases in the *Griffin-Douglas* line, e.g., *Britt v. North Carolina*, 404 U.S. 226 (1971) (ordinarily, right to trial transcript for use at retrial); *Roberts v. LaVallee*, 389 U.S. 40 (1967) (right to transcript of preliminary hearing for use at trial, without indication of need). See Kamisar, *supra* note 22, at 1-93 to 1-96.

68. 351 U.S. at 34-36.

69. 372 U.S. at 361-63.

70. Kamisar, *supra* note 22, at 1-104 (emphasis deleted). "The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant . . . , but only to assure the indigent defendant an adequate opportunity to present his claims fairly . . . ." *Moffitt*, 417 U.S. at 616. In other words, "[u]nder [*Moffitt*], indigent defendants . . . are guaranteed only 'adequate,' not equal, access to the judicial system." 49 GEO. WASH. L. REV. 191, 207 (1980). For a view that *Moffitt* did not significantly limit the *Griffin-Douglas* doctrine, see Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1320, 1334-36 & n.69 (1977).

71. See *Evitts v. Lucey*, 469 U.S. 387, 403-05 (1985); *Bearden v. Georgia*, 461 U.S. 660, 665-67 (1983).

72. See Kamisar, *supra* note 22, at 1-107 to 1-109. "The 'equality' principle once loomed as an awesome weapon, one with almost unlimited range, but — now that *Moffitt* is on the books — on many procedural frontiers this once treasured weapon may add nothing to what the indigent defendant or prisoner already has in his legal arsenal." *Id.* at 1-109 (emphasis in original).

73. See *The Supreme Court, 1984 Term*, *supra* note 29, at 137-40. For a survey of pre-*Ake* lower court cases on expert services decided on the basis of equal protection, see Decker, *supra* note 17, at 586-90.

74. 304 U.S. 458 (1938).

the state must appoint counsel for criminal defendants financially unable to retain their own. *Gideon v. Wainwright*<sup>75</sup> “incorporated” this element of the sixth amendment into the fourteenth amendment, thus making it applicable to the states. As early as *Powell v. Alabama*<sup>76</sup> the Court recognized that the assistance of counsel must be “effective,” and a number of state and lower federal courts have found in this right to effective assistance of counsel the source of a constitutional requirement that indigent defendants be provided with the assistance of experts.<sup>77</sup> One post-*Ake* case, whose facts bear a certain resemblance to those in *Ake*, has been decided on the basis of the ineffective assistance of counsel doctrine.<sup>78</sup>

At least one state case has derived a right to expert assistance from the sixth amendment right to the compulsory process of witnesses.<sup>79</sup> No case support, on the other hand, exists for a confrontation clause right to expert assistance, but one commentator has argued that “[e]xpert assistance and investigative preparation . . . seem necessary to preserve ‘the defendant’s . . . right to a fair trial as affected by his right *meaningfully* to cross-examine the witnesses against him.’ ”<sup>80</sup> A confrontation clause right to expert assistance would be particularly helpful in identifying the expert’s constitutionally required *role*.<sup>81</sup> The requirement that the expert assist counsel in the preparation of cross-examination, the essence of any confrontation clause right, would help to anchor the expert’s role as that of a defense consultant.

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75. 372 U.S. 335 (1963).

76. 287 U.S. 45 (1932).

77. See *Williams v. Martin*, 618 F.2d 1021, 1027 (4th Cir. 1980); *United States v. Decoster*, 624 F.2d 196, 210 (D.C. Cir. 1976) (en banc); *Mason v. Arizona*, 504 F.2d 1345, 1351 (9th Cir. 1974), cert. denied, 420 U.S. 936 (1975); *Hintz v. Beto*, 379 F.2d 937, 941 (5th Cir. 1967); *Bush v. McCollum*, 231 F. Supp. 560, 565 (N.D. Tex. 1964), aff’d., 344 F.2d 672 (5th Cir. 1965); *Decker*, supra note 17, at 593-99; Note, *Right to a Psychiatric Expert*, supra note 17, at 495-96; Note, *Criminal Procedure — An Indigent’s Constitutional Right to a State-Paid Expert* — *Williams v. Martin*, 16 WAKE FOREST L. REV. 1031, 1035-37 (1980) [hereinafter cited as Note, *State-Paid Expert*].

78. *Blake v. Kemp*, 758 F.2d 523 (11th Cir. 1985), cert. denied, 106 S. Ct. 374 (1985). In *Blake*, the prosecution withheld from the examining psychiatrist a revealing taped confession and a letter by the defendant; as a result the psychiatrist was unable effectively to examine the defendant. The similarity to *Ake* lies in the fact that the challenged state conduct made it impossible for the examining psychiatrist to form an opinion about the defendant’s sanity at the time of the offense. 758 F.2d at 528; cf. *Ake*, 470 U.S. at 72..

79. *People v. Watson*, 36 Ill. 2d 228, 221 N.E. 2d 645 (1966). The court held that the defendant in a forgery case was entitled to the expert assistance of a document examiner; funds were to be made available not only for the expense of presenting the expert witness at trial, but also for preliminary investigations related to the development of a defense. See *Decker*, supra note 17, at 590-93; Note, *Right to a Psychiatric Expert*, supra note 17, at 496-97; Note, *State-Paid Expert*, supra note 77, at 1037-38. *Watson* has not been followed outside Illinois. See *Decker*, supra note 17, at 591-93, and cases cited therein.

80. Note, *Indigent’s Right to an Adequate Defense*, supra note 17, at 643 (quoting *United States v. Wade*, 388 U.S. 218, 227 (1967) (emphasis added by cited Note)).

81. See Part IV *infra*.

## II. EXPERTS OTHER THAN PSYCHIATRISTS

The *Ake* opinion dealt exclusively with the indigent's right to a psychiatrist for the presentation of an insanity defense.<sup>82</sup> The Court did not address the question of whether the right to expert assistance might extend to other kinds of experts. Analysis of the opinion and of the constitutional doctrines on which it rests shows, however, that *Ake*'s logic extends to the provision of other kinds of expert assistance in appropriate cases.<sup>83</sup>

Because of *Ake*'s failure to address the question of other experts, as well as its emphasis on the importance of psychiatry in criminal law today,<sup>84</sup> an argument might be made for limiting *Ake* to its facts, *i.e.*, to the right to a psychiatrist for an insanity defense. The opinion is grounded, however, in very broad concepts of constitutional requirements, which indicate that it should have more general application. The Court declared that "when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense."<sup>85</sup> Citing the fourteenth amendment's "due process guarantee of fundamental fairness,"<sup>86</sup> the Court discussed its precedents in the area of indigent defendants' rights,<sup>87</sup> concluding that the state must provide the indigent defendant with "access to the raw materials integral to the building of an effective defense."<sup>88</sup>

The Court's conclusion that a psychiatrist is, in appropriate cases, one of these essential "raw materials" was based on its use of the three-prong test of *Mathews v. Eldridge*.<sup>89</sup> There is no reason to believe that the *Mathews* test would turn out any differently for a pathologist or a handwriting expert than it did for a psychiatrist in *Ake*.<sup>90</sup> The "private interest" — the defendant's interest in her life or liberty — is equally compelling, regardless of the nature of her defense or the type of expert required. The state's interest, largely an economic one, is hardly more heavily burdened by the requirement that it provide access to one competent ballistics expert or arson investigator, for example, than to the "one competent psychiatrist" required by

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82. As the Georgia Supreme Court pointed out in *Lindsey v. State*, 254 Ga. 444, 448-49, 330 S.E.2d 563, 566 (1985), *Ake* specifically required a *psychiatrist* in cases of an insanity defense; thus, "the guidelines of *Ake* would not be satisfied by providing the defense with access to an examination by a mental health expert other than a psychiatrist."

83. On the meaning of "appropriate cases," see Part V *infra*.

84. 470 U.S. at 79-83, 85.

85. 470 U.S. at 76.

86. 470 U.S. at 76.

87. 470 U.S. at 76.

88. 470 U.S. at 77.

89. 424 U.S. 319, 335 (1976).

90. See notes 43-49 *supra* and accompanying text.

*Ake*.<sup>91</sup> The experience of the federal government under the Criminal Justice Act,<sup>92</sup> and of various states that provide expert services, has shown that the costs involved are reasonable.<sup>93</sup> The “third prong,” “the probable value of the [expert] assistance sought, and the risk of error in the proceeding if such assistance is not offered,”<sup>94</sup> yields a similar result. It is difficult to imagine how, when a conviction may turn on an issue of fact that may be established or refuted by expert assistance, the value of such assistance and the risk of error from its denial could be less than in the case of a psychiatrist.<sup>95</sup>

As noted by *Ake*’s counsel, the states have “recognized the necessity of expert services in the most meaningful manner — by providing for State payment of experts’ fees *when the experts are hired by the prosecution*.”<sup>96</sup> Widespread prosecutorial use of many kinds of non-psychiatric<sup>97</sup> experts not only illustrates the importance of expert services but is also one reason why the defense is so seriously

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91. 470 U.S. at 79.

92. See text at notes 13-15 *supra*.

93. In response to Oklahoma’s argument in *Ake* that the cost of providing indigent defendants with psychiatrists would be “staggering,” Brief of Respondent at 47, counsel for *Ake* presented figures showing very modest annual costs for *all* expert services incurred by the federal government (\$832,305 in Fiscal Year 1983) and a sample of states (e.g., \$53,995 in Kansas; \$230,943 in Colorado; \$428,252 in New Jersey; \$1,209,183 in New York; \$18,292 in Vermont). Reply Brief for the Petitioner at 13. In light of these modest costs, it is difficult to argue seriously that the state’s fiscal interest should weigh heavily in the *Mathews* balance. Even if the cost of providing expert services were greater, it is at least open to question whether this factor should weigh heavily against the individual’s interest in her life or liberty. See note 41 *supra*.

A different kind of cost issue is whether, in an individual case, the expected cost of the requested expert services should affect their provision. This would be an issue particularly where the expense is unusually high. The best answer is probably that unusual expenses might legitimately require a somewhat higher showing of necessity for expert services. Cf. *United States v. Mundt*, 508 F.2d 904 (10th Cir. 1974), *cert. denied*, 421 U.S. 949 (1975) (refusal of authorization for an investigator to go to Peru in connection with the defendant’s arrest there for conspiracy to import cocaine did not violate the federal Criminal Justice Act, absent a strong showing as to necessity).

94. 470 U.S. at 79.

95. For an argument to the contrary, see Note, *supra* note 35, at 149-51.

96. Brief for the Petitioner at 28, *Ake* (emphasis in original).

97. Even in regard to psychiatrists, the *Ake* opinion dealt only with access to a psychiatrist for presentation of an insanity defense or on the issue of future dangerousness in capital sentencing proceedings. It did not explicitly address the right to a psychiatrist on other issues, such as determination of competency to stand trial or establishment of mitigating factors in sentencing. There has been some post-*Ake* litigation on such questions. For example, in *Kordenbrock v. Commonwealth*, 700 S.W.2d 384, 387 (Ky. 1985), it was held that *Ake* did not grant a capital defendant a “psychiatric fishing expedition” in a search for mitigating factors in sentencing; see also *Brewer v. State*, 718 P.2d 354, 363-64 (Okla. Crim. App. 1986). Whatever the merits of these particular cases, it is hard to believe that *Ake*, together with *Lockett v. Ohio*, 438 U.S. 586 (1978) (sentencer must be permitted to consider all aspects of defendant’s character as mitigating factors), would not guarantee a defendant the right to such psychiatric assistance as could help him to establish mitigating circumstances.

Two courts have dealt with requests for mental health experts on the issue of the defendant’s competency to waive his *Miranda* rights. Compare *In re Allen R.*, — N.H. —, 506 A.2d 329 (1986) (expert granted), with *State v. Massey*, 316 N.C. 558, 342 S.E.2d 811, 816 (1986) (expert denied).

handicapped without them. It is illusory to expect that an unassisted defense counsel could adequately represent his client when confronted with complex scientific evidence:

When counsel is shown a pathology report, a post-mortem photograph and a drawer full of autopsy specimens and slides, unless he himself is trained in pathology, he will be unlikely to spot possible errors of interpretation or description, the omission of relevant data and procedures, or indeed, the very significance — both medical and forensic — of what he is shown. Similar problems confront counsel in cases involving plant identification, handwriting, blood typology, identification of drugs or fingerprints.<sup>98</sup>

Given the importance of nonpsychiatric experts<sup>99</sup> to accurate fact-finding, *Ake*'s reasoning requires that they be made available to the indigent defendant as well as the prosecution.<sup>100</sup>

The right to expert assistance is also implicit in other opinions of the Court, such as *Gilbert v. California*.<sup>101</sup> In *Gilbert*, the Court held that the ability of the defense to present its own expert witnesses and to cross-examine prosecution experts at trial made it unnecessary for defense counsel to be present during "non-critical" stages of proceedings such as the taking of handwriting samples.<sup>102</sup> Thus, a defendant who because of indigency was unable to present an expert witness or effectively cross-examine prosecution experts would also be denied the

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98. Margolin & Wagner, *supra* note 17, at 663.

99. Even experts who would not be allowed to testify in court should be provided where they "reasonably appear to be necessary to assist counsel in their preparation." *United States v. Pope*, 251 F. Supp. 234, 241 (D. Neb. 1966) (interpreting the federal Criminal Justice Act) (emphasis in original). For example, polygraph tests may often be helpful even where not admissible, as in cases where the district attorney may be willing to drop prosecution if the defendant "passes" a polygraph test. See Oaks, *supra* note 15, at § 7.14[2]. The most frequently used type of non-testifying expert is the general investigator. See note 103 *infra*.

100. The American Bar Association's STANDARDS FOR CRIMINAL JUSTICE § 5-1.4 (2d ed. 1980) calls for provision of "investigatory, expert, and other services necessary to an adequate defense," without any limitation to specific types of experts such as psychiatrists. The commentary to this standard puts psychiatrists and other experts on the same plane in noting that "[t]he quality of representation at trial . . . may be excellent and yet valueless to the defendant if the defense requires the assistance of a psychiatrist or handwriting expert and no such services are available." *Id.*

Similarly, the federal Criminal Justice Act of 1964, 18 U.S.C. § 3006A(e)(1) (1982), provides for "investigative, expert, or other services necessary for an adequate defense." During the first two years after the Act's passage, the most frequently used services were investigators, psychiatrists, interpreters, handwriting experts, and fact witnesses. In addition, the following services were provided: bacteriologist, chemist, coin expert, certified public accountant, electroencephalographic test, fingerprint expert, gun expert, jewelry appraiser, key punch operator, electronic data processing machine operator, neurologist, neuropsychiatrist, neurosurgeon, ophthalmologist, optometrist, pathologist, pharmacologist, physician, psychologist, psychoanalyst, probation officer, sound expert statistician, surveyor, used clothing expert. Oaks, *supra* note 15, at § 7.14[1].

101. 388 U.S. 263 (1967).

102. 388 U.S. at 267; see also *United States v. Wade*, 388 U.S. 218, 227-28 (1967), where in dicta the Court made the same comment concerning the lack of necessity of the presence of counsel during the analysis of the defendant's "fingerprints, blood samples, clothing, hair, and the like."



Court-prescribed means of protecting her interests during these “non-critical” stages.

Since the *Ake* decision, its author has hinted strongly that *Ake* may require the appointment of investigators<sup>103</sup> for indigent defendants. Dissenting in *United States v. Bagley*,<sup>104</sup> Justice Marshall noted that “the Court has not . . . expressly required that the State provide to the defendant . . . investigators who will assure that the defendant has an opportunity to discover every existing piece of helpful evidence. *But cf. Ake v. Oklahoma* . . .”<sup>105</sup>

In the lower courts, a number of pre-*Ake* decisions involving investigators,<sup>106</sup> pathologists,<sup>107</sup> and handwriting experts<sup>108</sup> had found a constitutional duty to provide expert assistance. Few post-*Ake* cases have yet arisen where the courts have directly addressed the question of *Ake*’s applicability to other experts. Exceptional — and almost certainly wrong — is *Ex parte Grayson*,<sup>109</sup> where the Alabama Supreme Court rejected the petitioner’s “novel contention” that under *Ake* he was entitled to a forensic pathologist: “[T]here is nothing contained in the *Ake* decision to suggest that the United States Supreme Court was addressing anything other than psychiatrists and the insanity defense.”<sup>110</sup> Generally, where defendants have attempted to use the *Ake*

103. Investigators are among the most frequently needed types of defense experts. In recognition of this the federal Criminal Justice Act provides explicitly for “investigative” services. 18 U.S.C. § 3006A(e)(1) (1982). Despite some reluctance on the part of the federal courts to grant defense investigators, Oaks, *supra* note 15, at § 7.14[3]; Decker, *supra* note 17, at 605-07, investigators were the most frequently used category of experts during the first two years the Criminal Justice Act was in effect. Oaks, *supra* note 15, at § 7.14[1]. The Ninth Circuit has held that the provision of investigative services is required by due process when necessary to the preparation of an effective defense. *Mason v. Arizona*, 504 F.2d 1345, 1351 (9th Cir. 1974), *cert. denied*, 420 U.S. 936 (1975) (holding, however, that the showing of need had not been made). See also 13 WAKE FOREST L. REV. 655 (1977).

An additional reason for the provision of investigators is that an attorney doing her own investigation could be placed in an untenable position if a witness she interviewed changed his story in court. The attorney would then be faced with the difficult prospect of taking the stand to impeach the witness. See Margolin & Wagner, *supra* note 17, at 661 n.48; Comment, *Assistance in Addition to Counsel*, *supra* note 17, at 327 n.31; cf. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 (1983) (incompatibility of roles of witness and advocate).

104. 105 S. Ct. 3375 (1985). *Bagley* dealt with prosecutorial failure to disclose information favorable to the defense.

105. 105 S. Ct. at 3390 (emphasis added). In its only other post-*Ake* case where the issue has arisen, the Court declined to consider the defendant’s argument that he should have been granted an investigator, a fingerprint expert, and a ballistics expert, on the ground that he had failed to make a sufficient showing of need for them. *Caldwell v. Mississippi*, 105 S. Ct. 2633, 2637 n.1 (1985). On the showing required for access to an expert, see Part V *infra*.

106. *E.g.*, *United States v. Decoster*, 624 F.2d 196, 210 (D.C. Cir. 1976) (en banc); *Mason v. Arizona*, 504 F.2d 1345, 1351 (9th Cir. 1974), *cert. denied*, 420 U.S. 936 (1975).

107. *E.g.*, *Williams v. Martin*, 618 F.2d 1021 (4th Cir. 1980).

108. *E.g.*, *People v. Watson*, 36 Ill. 2d 228, 221 N.E.2d 645 (1966).

109. 479 So. 2d 76 (Ala.), *cert. denied*, 106 S. Ct. 189 (1985).

110. 479 So. 2d at 82. Even in this case the issues were mixed in such a way that the question may not have been squarely presented. The Alabama Court of Criminal Appeals, in passing on the case well before the *Ake* decision, had in fact recognized a constitutional right to nonpsychia-

precedent to obtain the assistance of nonpsychiatric experts, the courts have rejected the requests on the basis of insufficient showing of need for the expert.<sup>111</sup> Thus, while *Ake*'s reasoning strongly suggests that the constitutional right to expert assistance is not limited to psychiatrists for an insanity defense,<sup>112</sup> this remains to be established when an appropriate case arises.

### III. EXPERTS IN NONCAPITAL CASES

A second question concerns the offenses to which the requirement for provision of expert assistance should apply. The initial issue is whether *Ake* applies only to capital cases. If it is not so limited, as this Note argues, a further question is the extent to which it extends to relatively minor offenses. This Note suggests that the right to expert assistance should exist in all cases where there is a right to counsel.

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tric expert assistance in appropriate cases. It held, however, that Grayson had not established a need for the requested services. *Grayson v. State*, 479 So. 2d 69, 71-73 (Ala. Crim. App. 1984). Grayson had been granted the statutory limit of \$500 for expert services, which was spent on a public opinion survey in support of a motion for change in venue. The Alabama Supreme Court rejected his contention that the \$500 limit violated his right to effective assistance of counsel. 479 So. 2d at 78-79.

In another case dealing explicitly with *Ake*'s applicability to nonpsychiatric experts, the Oklahoma Court of Criminal Appeals rejected the defendant's contention that he should have been provided with an expert in bloodstain analysis. Distinguishing *Ake*, the court argued that — in contrast to sanity issues — the

risk [of inaccurate resolution] in other areas of scientific evidence is not necessarily present because the scientific expert is often able to explain to the jury how a conclusion was reached, the defense counsel can attack that conclusion, and the jury can then decide whether the conclusion had a sound basis.

*Plunkett v. State*, 719 P.2d 834, 839 (Okla. Crim. App. 1986). The court's apparent assumptions — that expert opinion in scientific fields other than psychiatry is less controversial, and that an unassisted defense counsel is competent to challenge such experts — are at least questionable. See text accompanying note 98 *supra*; notes 163-70 *infra* and accompanying text. Denial of a defense expert would seem to have been particularly inappropriate in this case, moreover, since the court was required to decide as a question of first impression whether the serological electrophoresis method of bloodstain analysis was sufficiently reliable to be admissible. See 719 P.2d at 839-40. The Michigan Supreme Court — with the benefit of expert opinion on both sides of the issue — has subsequently held electrophoresis evidence inadmissible. *People v. Young*, 425 Mich. 470, 391 N.W.2d 270 (1986).

111. See, e.g., *Hold v. State*, 485 So. 2d 801, 802-03 (Ala. Crim. App. 1986) (investigator); *Cargill v. State*, 255 Ga. 616, 340 S.E.2d 891, 904-05 (1986) (investigator and "interrogation expert"); *Commonwealth v. Thacker*, No. 85-CA-34-MR, slip op. (Ky. Ct. App. Sept. 27, 1985) (serologist); *State v. Artis*, 316 N.C. 507, 342 S.E.2d 847, 850-51 (1986) (jury selection expert); *State v. Massey*, 316 N.C. 558, 342 S.E.2d 811, 814-16 (1986) (investigator, statistician, social psychologist); *State v. Allen*, 77 N.C. App. 142, 334 S.E.2d 410, 412-13 (1985) (investigator); *Standridge v. State*, 701 P.2d 761, 764 (Okla. Crim. App. 1985) (bitemark expert); *State v. Berry*, 76 Or. App. 1, 707 P.2d 638, 640 (1985) (anthropologist); *State v. Evans*, No. 84-199, slip op. (Tenn. Crim. App. Nov. 27, 1985) (ballistics expert). In other cases, courts have rejected expert requests based on *Ake* on the ground that the proposed testimony would be inadmissible. See *State v. Campbell*, 127 N.H. 112, 498 A.2d 330 (1985) (child psychologist to evaluate the credibility of a child witness); *State v. Teeters*, No. C-840397, slip op. (Ohio Ct. App. Apr. 24, 1985) (expert on rape trauma syndrome). But cf. note 99 *supra*.

112. See notes 82-100 *supra* and accompanying text.

### A. *Capital and Noncapital Cases*

The issue of whether *Ake*'s holding applied only to capital offenses separated the *Ake* majority from the concurring and dissenting opinions.<sup>113</sup> While the majority did not explicitly address this question, nothing suggests that it intended to limit its holding to capital cases. To the contrary, the opinion speaks in broad terms of the recognition of the constitutional rights of indigent defendants, and it refers to the individual's compelling interest where her "life or liberty" is at stake.<sup>114</sup> Apart from the actual facts of the case, it is difficult to find anything in the opinion that would justify limiting its scope to capital cases. Moreover, where the constitutional violation requiring reversal occurs during the guilt rather than the sentencing phase of a trial,<sup>115</sup> and where, as here, the Court reverses the conviction rather than merely vacating the death sentence, "there is no logical basis for distinguishing between capital and non-capital defendants."<sup>116</sup>

Nonetheless, Chief Justice Burger's brief opinion concurring in the judgment asserted that "[n]othing in the Court's opinion reaches non-capital cases."<sup>117</sup> Arguing that the "finality" of the sentence warranted additional protection in capital cases, the Chief Justice wished to leave open the question of whether the assistance of a psychiatrist would be required in other cases.<sup>118</sup> In dissent, Justice Rehnquist urged that any right to psychiatric assistance be limited to capital cases. Unlike the Chief Justice, however, Rehnquist was well aware that the Court's opinion contained no such limitation.<sup>119</sup>

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113. As long as the issue is exclusively whether a psychiatrist, as opposed to other kinds of experts, is required, the question of whether *Ake* should extend to noncapital cases may rarely arise. Because a plea of insanity is "tantamount to an admission" of commission of the act, and because a successful insanity defense usually results in indeterminate confinement, "[i]nsanity pleas are almost exclusively raised in cases of homicide or other capital offenses." Gardner, *The Myth of the Impartial Psychiatric Expert*, 2 LAW & PSYCHOLOGY REV. 99, 104 (1976). Thus, the real significance of applying *Ake* to noncapital offenses is seen only when it is also applied to experts other than psychiatrists. See Part II *supra*.

114. 470 U.S. at 78 (emphasis added). The brief on behalf of *Ake* in the Supreme Court seems consciously to avoid placing any emphasis on the fact that this was a capital case (except in its section concerning the sentencing proceedings). Brief for the Petitioner at 18-37. Apparently the American Civil Liberties Union, which represented *Ake* in the Supreme Court, wished to establish a more broadly applicable precedent.

115. In *Ake*, of course, the defendant's rights were violated during *both* the guilt phase, 470 U.S. at 78-83, and the sentencing phase, 470 U.S. at 83-84.

116. Sallet, *After Hinckley: The Insanity Defense Reexamined* (Book Review), 94 YALE L.J. 1545, 1550 n.14 (1985).

117. 470 U.S. at 87. At least two courts have indicated uncertainty, in view of the Chief Justice's opinion, as to whether *Ake* applied to noncapital cases. See *Williams v. Newsome*, 254 Ga. 714, 715, 334 S.E.2d 171, 172 (1985); *Satterwhite v. State*, 697 S.W.2d 503, 507 (Tex. Crim. App. 1985); see also *State v. Evans*, No. 84-199, slip op. (Tenn. Crim. App. Nov. 27, 1985) (distinguishing *Ake* as a capital case). And one court has held flatly "that *Ake* does not reach noncapital cases." *Isom v. State*, 488 So. 2d 12, 13 (Ala. Crim. App. 1986).

118. 470 U.S. at 87.

119. 470 U.S. at 87.

An examination of the Court's entire line of indigents' rights cases, of which *Ake v. Oklahoma* is the latest, also demonstrates that a distinction between capital and noncapital offenses has no place here. Of the eight cases cited in *Ake*<sup>120</sup> to illustrate the Court's "long recogni[tion] that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense,"<sup>121</sup> only one was a capital case.<sup>122</sup> Important noncapital cases recognizing the rights of indigent defendants have been based on the sixth amendment right to counsel,<sup>123</sup> the fourteenth amendment equal protection guarantee,<sup>124</sup> and the fourteenth amendment due process clause.<sup>125</sup>

The same considerations apply here as in the earlier debate on whether the right to *counsel* should extend to noncapital crimes. One commentator argued then that "the crucial inquiry would seem to be, not so much the penalties imposed on the defendant upon conviction, but the *need* for skilled representation in the proceedings," concluding that there was little reason to believe that this need was greater in capital than noncapital cases.<sup>126</sup> Or, as Justice Clark noted in his concurring opinion in *Gideon*, "The Fourteenth Amendment requires due process of law for the deprivation of 'liberty' just as for deprivation of 'life,' and there cannot constitutionally be a difference in the quality of the process based merely upon a supposed difference in the sanction involved."<sup>127</sup> In light of these precedents it is difficult to see how a right, determined by the Court to be essential to the due process guarantee of a fair trial, could be limited to capital cases.<sup>128</sup>

120. See 470 U.S. at 76.

121. 470 U.S. at 76.

122. Only *Strickland v. Washington*, 466 U.S. 668 (1984), involved imposition of the death penalty. For the other, noncapital, cases cited by the Court, see note 39 *supra*.

123. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel at trial).

124. *Douglas v. California*, 372 U.S. 353 (1963) (right to appointed counsel on first direct appeal); *Griffin v. Illinois*, 351 U.S. 12 (1956) (right to a trial transcript for appeal).

125. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (right to appointed counsel under certain circumstances in parole and probation revocation proceedings). Even under the pre-*Gideon* right-to-counsel test of *Betts v. Brady*, 316 U.S. 455 (1942), where the appointment of counsel was required only when "special circumstances" were present, imposition of capital punishment was only one of several possible circumstances in which due process required the appointment of counsel. See W. LAFAVE & J. ISRAEL, *supra* note 41, at § 11.1(a).

126. Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 DEPAUL L. REV. 213, 230-31 (1959) (emphasis in original); see also Kamisar, *Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values*, 61 MICH. L. REV. 219, 254-60 (1962).

127. *Gideon v. Wainwright*, 372 U.S. 335, 349 (1963) (Clark, J., concurring). But cf. Comment, *The Constitutional Right to Assistance in Addition to Counsel in a Death Penalty Case*, 23 DUQ. L. REV. 753 (1985) (assuming that capital cases are qualitatively different).

128. It is also worth observing that the federal Criminal Justice Act of 1964, 18 U.S.C. § 3006A(e) (1982), which provides for the appointment of experts, contains no limitation to capital cases. In *United States v. Sloan*, 776 F.2d 926 (10th Cir. 1985), the court applied *Ake* to a

### B. Ake's Lower Limit

There remains the question of the "lower limit" of the constitutional right to an expert. Because the right to counsel may be ineffective where necessary expert assistance is denied,<sup>129</sup> an indigent defendant should be granted the assistance of necessary experts in all cases where he has the constitutional right to counsel.<sup>130</sup> In *Argersinger v. Hamlin*<sup>131</sup> the Court extended this right to misdemeanor cases where actual imprisonment is imposed; in *Scott v. Illinois*<sup>132</sup> it refused to go beyond this to an "authorized imprisonment" standard which would require the appointment of counsel for offenses for which imprisonment *could* be imposed.<sup>133</sup> As long as the line drawn by *Argersinger* and *Scott* defines the indigent defendant's right to counsel, it should also mark the lower limit of his right to expert assistance.<sup>134</sup>

## IV. ROLE OF THE EXPERT

One of the most difficult questions in the area of expert assistance

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noncapital case to reverse the trial court's determination that no defense psychiatrist was required under section 3006A.

129. See notes 76-78 *supra* and accompanying text. Even if it could be argued that the *Mathews* due process balancing test might yield a different result where "only brief incarceration" was involved, see *The Supreme Court, 1984 Term, supra* note 29, at 136 n.34, the indigent's right to an expert would still find support in the sixth amendment.

130. The federal Criminal Justice Act of 1964, 18 U.S.C. § 3006A (1982), follows this approach. Subsection (a)(4) provides that the Act, which requires the appointment of both counsel and expert services, applies to any person "for whom the Sixth Amendment to the Constitution requires the appointment of counsel." The federal scheme for the appointment of counsel and expert assistance goes beyond the constitutional requirement, however, notably by mandating the appointment of counsel and experts in the case of any offense for which a sentence of over six months' imprisonment *could* be imposed. See 18 U.S.C. § 3006A(a)(1) (1982); 18 U.S.C. § 1(3) (defining "petty offense"); Sentencing Reform Act of 1984 §§ 212, 223(e), 18 U.S.C.A. §§ 3559, 3006A(a)(1), (b) (1985), *as amended by* Sentencing Reform Amendments Act of 1985, Pub. L. No. 99-217, 99 Stat. 1728 (1985) (replacing the concept of "petty offense," effective November 1, 1987, by "Class B" misdemeanors or less).

131. 407 U.S. 25 (1972).

132. 440 U.S. 367 (1979).

133. *Scott* has been heavily criticized. See, e.g., Herman & Thompson, *Scott v. Illinois and the Right to Counsel: A Decision in Search of a Doctrine?*, 17 AM. CRIM. L. REV. 71 (1979); Elson, *supra* note 41, at 183-86. As it is difficult to argue that the right to expert assistance is *more* fundamental than the right to counsel, it is not contended here that the reach of *Ake* should extend beyond the right to appointed counsel, currently defined by *Scott*. But cf. note 134 *infra*.

134. *Ake* may also provide some basis for the application of a right to expert assistance in "quasi-criminal" civil proceedings. The Court noted that it had extended the rights of indigents "to a 'quasi-criminal' proceeding" in *Little v. Streater*, 452 U.S. 1 (1981), where in a paternity action the state was required to provide blood grouping tests for the putative father. *Ake*, 470 U.S. at 76. *Streater* was thus a recognition of a right under certain circumstances to expert assistance in a "quasi-criminal" case, well before *Ake* established this right in criminal cases as such. Arguably, the *Streater* and *Ake* decisions could lead to a more general right to expert assistance in certain kinds of civil proceedings, for example civil commitment hearings. But see *In re Williams*, 133 Ill. App. 3d 232, 478 N.E.2d 867, 869-70 (1985) (holding, in a civil commitment hearing, that the right recognized in *Ake* "has not been extended to civil cases").

is the definition of the expert's proper role. One model is that of the "neutral" expert, who makes her services and findings available to defense and prosecution alike. Alternatively, one can imagine a "partisan" expert or "defense consultant,"<sup>135</sup> who exclusively assists the defense in the same manner as would a retained expert. This Note argues that, in all respects except the defendant's free choice of his expert, a "partisan" expert is constitutionally required.<sup>136</sup>

A starting point for analysis is the *Ake* opinion itself. Justice Marshall's crucial language provides that once the necessary showing is made,<sup>137</sup> "the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination *and assist in evaluation, preparation, and presentation of the defense.*"<sup>138</sup> The expert's proper role is, in other words, that of a consultant for the defense. The Court's clear statement is, however, somewhat qualified by what follows: "This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own." Rather, "as in the case of the provision of counsel we leave to the States the decision on how to implement this right."<sup>139</sup> This qualification introduces sufficient ambiguity and "flexibility" to ensure considerable future litigation.<sup>140</sup>

An examination of the *Ake* Court's handling of its 1953 precedent, *United States ex rel. Smith v. Baldi*,<sup>141</sup> makes clear its position regarding the expert's role. The Court first distinguished *Baldi*, where "neutral psychiatrists" had in fact examined the defendant and testified at his trial.<sup>142</sup> *Baldi* thus did not address the *Ake* situation, where the defendant had been denied *any* psychiatric assistance concerning his sanity at the time of the offense; at most, the Court said, it stood for the proposition that an indigent defendant had a right only to the

135. The term "defense consultant" is from Justice Rehnquist's dissenting opinion in *Ake*, 470 U.S. at 87.

136. The inquiry here is into the minimum treatment which a state must provide in order to satisfy the constitutional requirement. A state could, of course, exceed the minimum standard (for example by permitting the defendant to choose his own expert), but it could not constitutionally deviate in the direction of a "neutral" expert.

137. See Part V *infra*.

138. 470 U.S. at 83 (emphasis added). At another point, Marshall states the tasks of the psychiatrist as follows: "to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses." 470 U.S. at 82.

139. 470 U.S. at 83.

140. Indeed, one post-*Ake* writer has predicted that this issue will be the subject of the next constitutional battles. Sallet, *supra* note 116, at 1551 n.18.

141. 344 U.S. 561 (1953); see note 19 *supra*. Until *Ake*, most courts which rejected the constitutional right to expert assistance relied on *Baldi*.

142. *Ake*, 470 U.S. at 84-85. The same was true, the Court noted, in *McGarty v. O'Brien*, 188 F.2d 151, 155 (1st Cir. 1951), on which the *Baldi* Court had relied. 470 U.S. at 85.

“neutral” assistance which the defendant in *Baldi* had received.<sup>143</sup> The assistance of a “neutral” expert is thus the *Baldi* standard. This standard the Court proceeded to reject, declaring that “our disagreement with the State’s reliance on [*Baldi*] is more fundamental. That case was decided at a time when indigent defendants in state courts had no constitutional right to even the presence of counsel.” Since then, the Court had recognized the elementary rights of indigent defendants and thus signaled its “commitment to assuring meaningful access to the judicial process.” Thus, “we are not limited by [*Baldi*] in considering whether fundamental fairness today requires a different result.”<sup>144</sup>

It is clear therefore from the *Ake* opinion that while the indigent defendant does not have the constitutional right to choose his own expert, and while the states are left some flexibility in implementation of arrangements for expert services, the expert is not to be “neutral”; rather, she is to assist the defense. Her role is to include the functions of investigation, evaluation of strategies, preparation and presentation of testimony, and preparation of cross-examination of prosecution experts.<sup>145</sup>

In spite of this relatively clear language in *Ake*, the issue appears not to be fully settled in practice. A number of post-*Ake* cases in the lower courts have accepted arrangements where only “neutral” experts — or less — were provided.<sup>146</sup> It is thus important to under-

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143. 470 U.S. at 85.

144. 470 U.S. at 85.

145. By establishing the indigent defendant’s right to a defense expert, *Ake* seems to have expanded the rights of nonindigents as well. This is apparent in *Tuggle v. Commonwealth*, 228 Va. 493, 323 S.E.2d 539 (1984), *vacated*, 105 S. Ct. 2315, *aff’d. on remand*, 230 Va. 99, 334 S.E.2d 838 (1985). Following a court-ordered sanity evaluation at a state hospital, the court denied defendant’s request for a second examination *at his own expense*. 323 S.E.2d at 544. The Supreme Court vacated the judgment and remanded “in light of *Ake v. Oklahoma*.” 105 S. Ct. 2315. On remand the Virginia Supreme Court held that Tuggle’s rights had been violated by denial of a defense psychiatrist in the sentencing phase of trial; in regard to the guilt phase it held that the defendant had not made the requisite showing that sanity was to be a significant factor in his defense, but it made no reference to defendant’s nonindigent status. 334 S.E.2d at 841-44. Thus, the actions of both the United States and Virginia Supreme Courts indicate that they see the *Ake* right to a defense psychiatrist as extending to nonindigent defendants. Similarly, *Ake*’s emphasis on the right to an independent defense expert should result in reexamination of rules which limit independent analysis of physical evidence to evidence which is “critical” (*i.e.*, the only evidence linking the defendant to the crime) and subject to varying expert opinions. See *Hoback v. Alabama*, 607 F.2d 680 (5th Cir. 1979); *Barnard v. Henderson*, 514 F.2d 744 (5th Cir. 1975); *Ex parte Grayson*, 479 So. 2d 76, 79 (Ala.), *cert. denied*, 106 S. Ct. 189 (1985).

146. See, e.g., *Glass v. Blackburn*, 791 F.2d 1165, 1168-69 (5th Cir. 1986) (discussed at note 150 *infra* and accompanying text); *Magwood v. Smith*, 791 F.2d 1438, 1443 (11th Cir. 1986) (discussed at note 175 *infra*); *Palmer v. State*, 486 N.E.2d 477, 481-82 (Ind. 1985) (discussed at note 151 *infra* and accompanying text); *Commonwealth v. Thacker*, No. 85-CA-34-MR, slip op. (Ky. Ct. App. Sept. 27, 1985) (discussed at note 152 *infra* and accompanying text); *State v. Indvik*, 382 N.W.2d 623, 625-26 (N.D. 1986) (discussed at note 150 *infra* and accompanying text); *Satterwhite v. State*, 697 S.W.2d 503, 506 (Tex. Crim. App. 1985) (discussed in text at note 150 *infra*); *Tuggle v. Commonwealth*, 230 Va. 99, 334 S.E.2d 838, 840-41 (1985) (discussed in text at note 150 *infra*). But see, e.g., *Lindsey v. State*, 254 Ga. 444, 449, 330 S.E.2d 563, 567

stand *why* a "partisan" expert is essential to due process.<sup>147</sup>

There are several reasons why an "impartial" or "neutral" expert is not an adequate safeguard of the defendant's constitutional rights.<sup>148</sup> The problem is particularly severe, first of all, under a scheme where the "neutral" expert's findings are available to both the defense and the prosecution. It is difficult, in such a situation, to imagine a defense attorney, unless his case was already a very weak one, requesting the appointment of such an expert without being certain of a favorable result. Otherwise, he would risk creating evidence against his client and "convicting [his] own client with [his] diligence and zeal."<sup>149</sup> Several post-*Ake* cases have, to be sure, condoned procedures under which the expert reported his findings to the court<sup>150</sup> or to the prose-

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(1985) ("[I]n addition to examining the defendant, the psychiatrist must assist the defense by aiding defense counsel in the cross-examination and rebuttal of the state's medical experts.").

147. In addition, the analysis presented below is important for purposes of dealing with problems which are likely to arise from the Court's willingness to leave implementation to the states. See notes 183-89 *infra* and accompanying text.

148. For an argument to the contrary, see Note, *Right to a Psychiatric Expert*, *supra* note 17, at 499-504.

149. Margolin & Wagner, *supra* note 17, at 666. Even where the test results are not disclosed, the mere knowledge that an examination took place may be prejudicial. See, e.g., *Hill v. State*, 432 So. 2d 427, 437 (Miss.), *cert. denied*, 464 U.S. 977 (1983), where the court cited as evidence of the defendant's competence his failure to offer the testimony of a psychologist who had examined him prior to trial.

At least one court has suggested that procedures where the "neutral" expert makes his findings available to the prosecution and the defense might raise constitutional problems of self-incrimination. *United States v. Brodson*, 136 F. Supp. 158, 166 (E.D. Wis. 1955) (questioning constitutionality of former FED. R. CRIM. P. 28, predecessor of FED. R. EVID. 706(a), which required court-appointed expert to disclose findings to both parties), *revd. on other grounds*, 241 F.2d 107 (7th Cir. 1957); see also *Oaks*, *supra* note 15, at § 7.16[3]. In *Smith v. Murray*, 106 S. Ct. 2661 (1986), the Supreme Court declined an opportunity to rule on the admissibility of damaging testimony by a psychiatrist appointed by the court to examine the defendant at the latter's request, deciding the case instead on procedural grounds. Four Justices, however, were willing to reach the merits and would have held that, at a minimum, admitting the examining psychiatrist's testimony would violate the defendant's fifth amendment privilege against self-incrimination, unless the psychiatrist gave *Miranda* warnings prior to the examination. 106 S. Ct. at 2675-76 & n.23 (Stevens, J., dissenting). The dissenters found it unnecessary to consider the argument that where the psychiatric examination was ordered to assist the defense the due process concerns of *Ake* required "an absolute guarantee of confidentiality," rather than merely the giving of *Miranda* warnings. 106 S. Ct. at 2676 n.23.

The reports of a defense expert are generally discoverable by the prosecution only when the defense intends to introduce the reports or the expert's testimony at trial. Otherwise discovery would be barred by the fifth amendment privilege against self-incrimination or the sixth amendment right to effective assistance of counsel. See W. LAFAYE & J. ISRAEL, *supra* note 41, at § 19.4(i). The concerns here are similar to those which have led most states to apply the attorney-client privilege to the work of defense experts. See, e.g., *State v. Pratt*, 284 Md. 516, 520, 398 A.2d 421, 423 (1979) ("[I]t is now almost universally accepted in this country that the scope of the attorney-client privilege, at least in criminal causes, embraces those agents whose services are required by the attorney in order that he may properly prepare his client's case."). But cf. Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597, 635-42 (1980) (urging that the attorney-client privilege not be used to exclude psychiatric testimony when the defendant's mental state is at issue).

150. *Glass v. Blackburn*, 791 F.2d 1165, 1168-69 (5th Cir. 1986) (two-doctor "sanity commission" reporting to the court); *State v. Indvik*, 382 N.W.2d 623, 625-26 (N.D. 1986) (state hospital staff psychiatrists, who ultimately testified for the prosecution); *Satterwhite v. State*, 697



cution for transmittal to the defense,<sup>151</sup> or where the defense was simply given access to the findings of the state's experts.<sup>152</sup> A better reading of *Ake*, however, is that of the Tenth Circuit, which emphasized in *United States v. Sloan*<sup>153</sup> that the Court's duty to appoint a defense expert "cannot be satisfied with the appointment of an expert who ultimately testifies contrary to the defense . . . . The essential benefit of having an expert in the first place is denied the defendant when the services of the doctor must be shared with the prosecution."<sup>154</sup>

More fundamentally, the use of an "impartial" expert subverts the adversary system by shifting the decision from the jury (or judge) to the expert. Expert opinion is, in fact, often unreliable,<sup>155</sup> and use of an "impartial" expert gives a false illusion of certainty; a "battle of the experts" in the context of the adversary system, on the other hand, permits the jury to evaluate scientific opinions. Thus, due process may be denied where the indigent defendant is not granted the resources to participate independently in this "battle of the experts."<sup>156</sup>

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S.W.2d 503, 506 (Tex. Crim. App. 1985); *Tuggle v. Commonwealth*, 230 Va. 99, 334 S.E.2d 838, 840-41 (1985).

151. *Palmer v. State*, 486 N.E.2d 477, 481-82 (Ind. 1985). The court did hold that in order to comply with *Ake* the psychiatrist would have to be "available for consultation with [defense] counsel"; it added, however, that such consultations could not take place before the psychiatrist examined the defendant. 486 N.E.2d at 482. The court's model is still that of a "neutral" expert, with some concession to the defense counsel's need to prepare for trial. It is doubtful, to say the least, that such an arrangement satisfies the requirements of *Ake*. The most obvious objection is that the defense counsel must surely be permitted to form an opinion about the viability of an insanity defense (to use this example) without creating evidence which can be used against his client.

152. *Commonwealth v. Thacker*, No. 85-CA-34-MR, slip op. (Ky. Ct. App. Sept. 27, 1985) ("[A]ppellee herein was not denied the results and reports of the serologist who did testify, and should have had some idea of the nature of his testimony prior to trial."). The court disposed of *Ake* by asserting that the Supreme Court's mention in a footnote of relevant Kentucky statutes meant "that Kentucky . . . provides the necessary assistance." *Cf. Ake*, 470 U.S. at 78 n.4 (listing statutes and judicial decisions in 41 states which provide psychiatric assistance to indigent defendants).

If defense access to findings of the prosecution experts is deemed adequate, why not the reverse? Simply to mention the possibility that the prosecution could be precluded from utilizing government funds for its own expert because a defense expert's report was available should suffice to demonstrate the incompatibility with an adversary proceeding of such one-sided arrangements. See Margolin & Wagner, *supra* note 17, at 658.

153. 776 F.2d 926 (10th Cir. 1985).

154. 776 F.2d at 929. An example of a state's recognition of the partisan nature of the defense expert and the confidential nature of her relationship with defense counsel is to be found in Florida's Rules of Criminal Procedure. These provide that in appropriate cases where insanity or incompetence is at issue, the court "shall appoint one expert to examine the defendant in order to assist his attorney in the preparation of his defense. Such expert shall report only to the attorney for the defendant and matters related to the expert shall be deemed to fall under the lawyer-client privilege." FLA. R. CRIM. P. 3.216(a).

155. See notes 162-70 *infra* and accompanying text.

156. The question raised here has potentially broader significance than the application to indigent defendants. Although rarely used, FED. R. EVID. 706 permits the court to appoint its own independent expert, who "shall advise the parties of his findings." For a discussion of some

It is important to note that the question is not whether an impartial expert could provide due process in any setting, but rather whether such an arrangement provides due process for the indigent defendant in the American criminal justice system based on adversary proceedings. What may be fair in some nonadversarial settings may be a denial of justice in the context of the adversary system.<sup>157</sup> As the Supreme Court has noted, "[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."<sup>158</sup> And if the criminal justice process "loses its character as a confrontation between adversaries, the constitutional guarantee [of the effective assistance of counsel] is violated."<sup>159</sup>

Considerable empirical evidence on the use of court-appointed "impartial" experts, and particularly psychiatrists, has shown that the trier of fact, whether judge or jury, almost invariably accepts the expert's opinion.<sup>160</sup> Thus, the decisionmaking function shifts from the jury or judge to the expert, undermining the adversary system.<sup>161</sup>

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of the problems involved in judges calling their own expert witnesses, see Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge*, 64 VA. L. REV. 1, 74-80 (1978).

157. Cf. *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968) (For "incorporation" of specific provisions of the Bill of Rights into the fourteenth amendment, the question is not whether the provision constitutes "fundamental fairness in every criminal system that might be imagined but [whether it] is fundamental in the context of the criminal processes maintained by the American States.").

158. *Herring v. New York*, 422 U.S. 853, 862 (1975).

159. *United States v. Cronin*, 466 U.S. 648, 656-57 (1984).

160. An examination of the use of court-appointed experts, based on research in Sweden and on various American studies, concluded that "the presentation of psychiatric opinions to a judge or jury by court-appointed psychiatrists designated 'impartial,' rather than by psychiatrists called by and identified with the state or defense as adversaries, shifts the decision-making power from the judge or jury to the testifying psychiatrists." Reisner & Semmel, *Abolishing the Insanity Defense: A Look at the Proposed Federal Criminal Code Reform Act in Light of the Swedish Experience*, 62 CALIF. L. REV. 753, 770 (1974). In the Swedish study, the courts followed the psychiatrists' recommendations in 99% of the cases. *Id.* Similarly, a study of the results of jury trials in states providing for court appointment of a state mental institution showed that, over periods of 23 and 30 years, juries rejected the hospitals' conclusions in only five of 1000 cases in Ohio, and only once in 500 cases in Maine. Guttmacher & Weihofen, *The Psychiatrist on the Witness Stand*, 32 B.U. L. REV. 287, 313-14 (1952). A former practicing psychiatrist at St. Elizabeth's Hospital in the District of Columbia noted from his experience that "[i]n the overwhelming majority of cases the hospital's report to the court is the sole determinant of the outcome of the insanity defense." Pugh, *The Insanity Defense in Operation: A Practicing Psychiatrist Views Durham and Brawner*, 1973 WASH. U. L.Q. 87, 89. The trial becomes merely "a nonadversary process of rubber stamping the conclusions of psychiatrists regarding the defendant's responsibility." Gardner, *supra* note 113, at 106. See also A. GOLDSTEIN, *supra* note 35, at 131-36; Goldstein & Fine, *The Indigent Accused, the Psychiatrist, and the Insanity Defense*, 110 U. PA. L. REV. 1061, 1067-76 (1962).

161. The undermining of the adversary system may also have broader consequences for the system of justice and the community within which it exists. As noted by the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice, the adversary system evolved out of "a system of justice that provide[d] inadequate opportunities to challenge official decisions . . . . As such, it makes essential and invaluable contributions to the maintenance of the free society." Thus, "the conditions produced by the financial incapacity of the accused are detrimental to the proper functioning of the system of justice and . . . the loss in vitality of the

Moreover, the appearance of certainty presented by the testimony of a court-appointed "impartial" expert is often an illusion. While particularly clear in the case of psychiatric testimony,<sup>162</sup> evidence of the unreliability or misuse of expert opinions exists in fields such as laboratory testing,<sup>163</sup> handwriting,<sup>164</sup> pathology,<sup>165</sup> fingerprinting,<sup>166</sup> arson inves-

adversary system, thereby occasioned, significantly endangers the basic interests of a free community." POVERTY AND THE ADMINISTRATION OF JUSTICE, *supra* note 3, at 10-11.

162. Reisner and Semmel note that the argument for "impartial" psychiatric experts rests on three premises: "first, that the diagnostic and predictive process is scientific, that is, having some unified theoretical framework capable of producing an acceptable level of reliability; second, that a state-operated psychiatric service is 'impartial;' third, that the issue to be determined is purely a scientific one." Reisner & Semmel, *supra* note 160, at 772 (footnotes omitted). In fact, they find that "[f]ew scientific disciplines contain such a range of theories as clinical psychology and psychiatry," *id.*; that diagnosis is highly subjective, depending on factors such as the examiner's personality, age, nationality, peer group influence, and theoretical orientation, *id.* at 773; that there is little agreement on diagnostic categories, resulting in a lack of diagnostic reliability, *id.* at 774-76; that court-appointed psychiatrists tend to come from a self-selected group with an orientation toward narrow interpretation of legal criteria, *id.* at 782; that psychiatrists from state hospitals may reflect an institutional bias stemming from the high degree of debilitation of those they can normally admit, *id.*; and that in the American tradition the determination of sanity in a criminal trial reflects societal concerns beyond purely medical expertise. *Id.* at 783-84. The literature in which similar arguments are advanced is voluminous. See, e.g., T. BLAU, THE PSYCHOLOGIST AS EXPERT WITNESS 93 (1984) (in most cases opinions likely to be equivocal and varied); A. GOLDSTEIN, *supra* note 35, at 133-34 (psychiatric testimony subject to distortion and differences reflecting differing values and schools); A. MATTHEWS, MENTAL DISABILITY AND THE CRIMINAL LAW 40-43 (1970) (prosecution orientation and institutional bias of "impartial" experts); I. J. ZISKIN, COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY (3d ed. 1981); Diamond, *The Fallacy of the Impartial Expert*, 3 ARCHIVES CRIM. PSYCHODYNAMICS 221 (1959); Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439 (1974) (inability of psychiatrists to predict future dangerousness); Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693 (1974) (psychiatric judgments in civil commitment cases are unreliable and invalid); Gardner, *supra* note 113, at 107 (Impartial experts "are neither the impartial dispensers of scientific verity they are assumed to be nor do they possess any unique expertise in matters involving criminal responsibility."); Goldstein & Fine, *supra* note 160, at 1072-74 (no consensus among psychiatrists on answers to questions likely to arise in court, or on psychiatric qualifications and techniques); Gray, *The Insanity Defense: Historical Development and Contemporary Relevance*, 10 AM. CRIM. L. REV. 559, 580-81 (1972) (cursory nature of psychiatric evaluations in public mental hospital); Poythress, *Mental Health Expert Testimony: Current Problems*, 5 J. PSYCHIATRY & L. 201, 202-09 (1977); Pugh, *supra* note 160, at 93-105 (lack of reliability and validity in sanity tests); *id.* at 95 ("A common experience was that a new doctor on the service would find virtually every defendant insane. . . . However, after being confronted with the task of trying to manage an unselected group of felons in the hospital following their criminal commitment, the new doctor would reverse tack and become very stringent about finding defendants insane.").

163. A national evaluation of the accuracy of tests done in 240 forensic laboratories, funded by the Law Enforcement Assistance Administration, produced the following results:

The laboratories mis-identified or had an otherwise unacceptable response in 18% of the cases involving the identification of an unknown controlled substance. Twenty-eight percent could not perform proper ballistics tests, 20% failed to identify paint samples, and 71% could not identify blood samples. In fact, only 49 of 240 participating laboratories received a grade of "100%." It should be noted that this 100% figure was arrived at only by deleting the results of two of the twenty-one tests (those for hair and firearms). Evidently, none of the 240 laboratories was able to identify all of the samples — and only one-fifth were able to identify most of them.

Kurzman, *Challenging "Scientific Evidence": Using the Results of the Laboratory Proficiency Testing Research Program*, in RESULTS OF THE LABORATORY PROFICIENCY TESTING RESEARCH PROGRAM xii (National College for Criminal Defense 1979) (emphasis in original) [hereinafter cited as PROFICIENCY TESTING PROGRAM]. The authors of the LEAA research report

concluded, moreover, that such poor results "could be expected. All of the previous reports which have addressed the issue have inferred the likelihood of such a finding." PROFICIENCY TESTING PROGRAM, *supra*, at 261.

One defense lawyer with a scientific background has made the following observation regarding the generally low quality of testimony by laboratory experts:

The expert has only the vaguest understanding of the principles of the scientific discipline in which he testifies; he has no knowledge of the mathematics which expresses these principles and relates the significant variables. He knows little more about the operation of his measuring instruments than the location of the on-off switch. He knows virtually nothing about the interpretation of the results of his tests and less about statistical techniques for assessing the validity of his conclusions.

Shellow, *The Laboratory Proficiency Testing Program: What it Means*, in PROFICIENCY TESTING PROGRAM, *supra*, at iii. This state of affairs suggests not only the possibility of errors, but also the potential for impeachment of prosecution experts, if defense counsel has been able to prepare a cross-examination with the assistance of her own expert.

Laboratories may also be subject to subtle pressures which might result in bias. One study of the functioning of crime laboratories notes that "[a]s a part of the total police function, the laboratory is expected to justify the resources budgeted for its scientific services. This pressure has led, in some instances, to record keeping which stresses convictions, clearances, or positive findings . . ." J. PETERSON, *THE UTILIZATION OF CRIMINALISTICS SERVICES BY THE POLICE* 5 (1974).

164. While disagreement on handwriting identification is relatively rare among competent document examiners, the field is full of "persons holding themselves out as experts . . . whose qualifications are subject to serious attack." A. MOENSSENS & F. INBAU, *SCIENTIFIC EVIDENCE IN CRIMINAL CASES* 477 (2d ed. 1978). In addition, disagreements among fully qualified experts do occur, as in the 1972 Howard Hughes autobiography hoax. *Id.* at 478; *cf.* *State v. Hancock*, 164 N.W.2d 330, 332-33 (Iowa 1969) (court granted forgery defendant her own handwriting expert because of recognition of variations in handwriting analyses).

165. Where, as in many states, analysis of causes of death is performed by the local coroner's office, the reliability of the results is often questionable:

It has been suggested that the coroner may be visualized as a poorly paid, undertrained and unskilled individual, popularly elected to a somewhat obscure office for a short term, with a staff of mediocre ability. Since it is frequently difficult for the trained forensic pathologist to distinguish the cause of death, that task is obviously much more difficult when the physician is not a trained forensic pathologist, or perhaps not even a pathologist.

In rural communities, local physicians and surgeons who are available to the coroner to perform autopsies may lack the necessary experience and training in pathology to make meaningful diagnoses. If a capable pathologist from another jurisdiction is not called in to do the autopsy, serious errors in postmortem diagnosis are likely. When matters proceed to criminal trial, an untrained physician who is offered as an expert to prove cause and effect issues may be effectively impeached by a well prepared cross-examiner.

A. MOENSSENS & F. INBAU, *supra* note 164, at 221. A related problem is the tendency of many courts to permit nonspecialized physicians to testify as experts on cause of death issues. *Id.* at 260, 267-68.

For examples of expert disagreement, see *California v. Gutierrez*, No. 84415 (Cal. Super. Ct., San Francisco Cty., Nov. 11, 1972), and *People v. Barry*, No. 136128 (Cal. Super. Ct., San Mateo Cty., Sept. 11, 1968), unreported California cases discussed in Margolin & Wagner, *supra* note 17, at 657 n.35, 658. In *Gutierrez*,

the coroner testified "with 95% conviction" from a postsuture photograph of the wound and without reference to any other facts, that the wound could not have been self-inflicted but had to be assaultive. He based this opinion on the absence of "hesitation marks" typical of suicidal wounds, and the curving angle of the wound. The defense pathologist, equally adamant in his opinion, testified that hesitation marks under the ear probably were obliterated in surgery; that a post-operative photograph was an unreliable source of information on the subject; that the breaks in the line of the wound indicated hesitation marks anyway; that the turn of the head, the shallowness of the wound [and various nonpathological factors] all suggested a suicidal act.

*Id.* at 657 n.35. In *Barry*, two qualified pathologists disagreed over whether a slide showed tissue depleted of blood or satiated with blood. *Id.* at 658.

166. While there are seldom direct conflicts in interpretation of fingerprint evidence, such

tigation,<sup>167</sup> alcohol intoxication testing,<sup>168</sup> bitemark identification,<sup>169</sup> and voice identification.<sup>170</sup>

The adversary system and the much-maligned "battle of the experts" recognize that the expert, like any other witness, is fallible,<sup>171</sup> and that the truth is most likely to emerge through each side presenting its own case. The use of an "impartial" expert, on the other hand, ensures that the indigent defendant has no real chance to challenge the expert's testimony. If the "neutral" expert testifies adversely to the defendant's position, "the accused will have no resources available to make the kind of corrections the adversary process assumes he is able to make. . . . [Cross-examination without the assistance of an expert] will hardly suffice to provide the indigent accused with the 'adequate

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evidence may still be subject to error: "[I]n a great number of criminal cases an expert or consultant on fingerprints for the defense has been instrumental in seriously undermining the state's case by demonstrating faulty procedures used by the state's witnesses or by simply showing human errors in the use of fingerprint evidence." A. MOENSSENS & F. INBAU, *supra* note 164, at 368. And, while infrequent, differing interpretations of fingerprint evidence do arise. See *United States v. Durant*, 545 F.2d 823, 828 (2d Cir. 1976) (reversing conviction because of failure to provide defense fingerprint expert under the federal Criminal Justice Act); A. MOENSSENS & F. INBAU, *supra* note 164, at 392 (circumstances which may lead to disagreement in identification); Note, *Indigent's Right to an Adequate Defense*, *supra* note 17, at 638 n.38 (reporting case of expert disagreement, resulting in acquittal).

167. See the contradictory conclusions of two arson investigations in a case discussed in M. SAKS & R. VAN DUIZEND, *THE USE OF SCIENTIFIC EVIDENCE IN LITIGATION* 36-37 (1983).

168. A. MOENSSENS & F. INBAU, *supra* note 164, at 84-86 (sources of error in blood, urine, and breath tests).

169. According to Moenssens and Inbau, bitemark examinations are helpful primarily as investigative leads. Only rarely can they provide a positive identification of a particular individual. A. MOENSSENS & F. INBAU, *supra* note 164, at 650-52, 656-58. In spite of their controversial status among professionals in forensic odontology, bitemark examinations appear to be generally accepted by the courts. See *Standridge v. State*, 701 P.2d 761, 763 (Okla. Crim. App. 1985); *Tuggle v. Commonwealth*, 230 Va. 99, 334 S.E.2d 838, 845 (1985); A. MOENSSENS & F. INBAU, *supra* note 164, at 654-56.

170. See A. MOENSSENS & F. INBAU, *supra* note 164, at 580-84 (criticizing the professional certification association for spectrographic voice identification as lacking scientific detachment and dominated by individuals whose careers are dependant on the success of spectrographic techniques). The courts are divided on the admissibility of spectrographic voice identifications. Compare *United States v. Williams*, 583 F.2d 1194 (2d Cir. 1978), *cert. denied*, 439 U.S. 1117 (1979), with *People v. Kelly*, 17 Cal. 3d 24, 549 P.2d 1240, 130 Cal. Rptr. 144 (1976), and *People v. Tobey*, 401 Mich. 141, 392 N.W.2d 537 (1977). See generally A. MOENSSENS & F. INBAU, *supra* note 164, at 564-86.

171. Cf. Margolin & Wagner, *supra* note 17, at 657:

[P]erhaps "the battles of the experts" are neither unnecessary nor improper. The very fact that experts do disagree demonstrates that an expert should not be presumed infallible merely because he is selected by the court. In fact, experts, from psychiatrists and pathologists to professors of criminalistics, remain quite human behind the facade of their superior qualifications and much in their testimony goes not to abstract factual findings but to findings anchored in their philosophical predispositions, rooted in their unconscious tendencies and sprouting a veritable forest of personal mannerisms.

Similarly, Reisner and Semmel, noting the lack of consistency in psychiatric diagnoses, conclude that "[t]raditional adversary procedures are the best for exposing differences in professional judgments. The oft-decried 'battle of the experts' is, in fact, particularly appropriate where the experts so often disagree." Reisner & Semmel, *supra* note 160, at 787.

defense' which only his own expert can assure."<sup>172</sup> Particularly because of the "mystic infallibility" which lay juries often accord the testimony of scientific experts, "the ability to produce rebuttal experts, equally conversant with the mechanics and methods of a particular technique, may prove to be essential."<sup>173</sup>

In addition to the problem of shifting the decision about the defendant's fate from the jury to an expert, there are other reasons why it is essential for the indigent defendant to have her own "partisan" expert. One is the potential conflict of interest if, for example, the court appoints a state agency to undertake tests or carry out investigation requested by the defendant. If, in such a situation, the agency discovered evidence incriminating to the defendant, it would be faced with an "inescapable conflict of interest" between its "duty to the accused and [its] duty to the public interest."<sup>174</sup>

The notion that an "impartial" expert could suffice to guarantee the indigent defendant due process of law also overlooks the important functions performed by the expert in addition to testimony at trial. The Court outlined these in *Ake*: investigation of the facts, evaluation of the viability of a given defense, and especially assistance in preparing cross-examination of the prosecution's experts.<sup>175</sup> Moreover, the lawyer and the expert must work together closely enough to perform a mutual education function.<sup>176</sup>

The preparation of cross-examination is probably the most crucial of these additional functions.<sup>177</sup> Without the assistance of an expert at this stage, defense counsel may well be unable to challenge even an

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172. Goldstein & Fine, *supra* note 160, at 1075-76.

173. *United States v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974).

174. *Marshall v. United States*, 423 F.2d 1315, 1319 (10th Cir. 1970). In *Marshall*, the trial court responded to the defendant's request for investigative assistance in another city by appointing the Federal Bureau of Investigation. The FBI, acting on information supplied by the defendant, located a witness who was ultimately subpoenaed by the prosecution and testified adversely to the defendant. The Tenth Circuit reversed.

175. *Ake*, 470 U.S. at 82; *see also* *United States v. Crews*, 781 F.2d 826, 833-34 (10th Cir. 1986) (despite testimony of four treating or court-appointed psychiatrists, defendant was entitled to his own psychiatrist to aid in interpretation of experts' findings and in preparation of cross-examination). These additional functions of the expert were ignored in *Magwood v. Smith*, 791 F.2d 1438, 1443 (11th Cir. 1986), *affg.* 608 F. Supp. 218 (M.D. Ala. 1985). The *Magwood* court approved the denial of the defendant's motion for appointment of an independent expert, distinguishing *Ake* on the grounds that here three of the state's six experts had testified favorably to the defendant's position. The court overlooked the fact that presenting testimony is only one of several functions which *Ake* identified for the expert. In *Magwood* the defendant presumably had no expert assistance in, for example, preparation of cross-examination of the experts favorable to the state. In view of the closeness of the insanity issue in this case, *see* 791 F.2d at 1449-50; 608 F. Supp. at 226-28, it is difficult to dismiss the possibility that such assistance might have made a difference in the verdict.

176. For a discussion of the relationship between lawyer and psychiatrist in preparing for trial, *see* Goldstein & Fine, *supra* note 160, at 1064-66.

177. The Supreme Court has indicated the importance of defense experts to cross-examination in *Gilbert v. California*, 388 U.S. 263, 267 (1967), and *United States v. Wade*, 388 U.S. 218, 227-28 (1967); *see* notes 101-02 *supra* and accompanying text.

expert whose testimony rests on a shaky foundation.<sup>178</sup> As one trial handbook points out, cross-examination of an opposing expert can be effective only if the attorney has “become somewhat of an expert on the subject . . . by preparation[,] study, and *consultation with her own experts*.”<sup>179</sup>

An additional consequence of the lack of a “partisan” expert is that it can be virtually impossible for the defendant to demonstrate to an appellate court the prejudice he has suffered from the denial of expert assistance. Without the means to challenge the findings of a “neutral” expert, defense counsel cannot build a record for review.<sup>180</sup> The result is that reviewing courts uphold the denial of a defense expert because the state’s expert evidence was “unchallenged,”<sup>181</sup> or because the record fails to show “any question about the validity or accuracy of the tests performed.”<sup>182</sup>

Even if it is established that a “partisan” expert is essential to the indigent defendant’s assertion of his constitutional rights, there remains the question of how this expert is to be selected. Here, *Ake* is likely to generate considerable confusion, for while the opinion makes clear that the expert must be a “defense consultant,” it also denies the indigent defendant the right to choose his own expert and leaves to the states the implementation of the right to an expert.<sup>183</sup>

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178. See the comments of forensic experts, noted by M. SAKS & R. VAN DUIZEND, *supra* note 167, at 45, that “cross-examination often is irrelevant to what they consider to be the main issues.” A deputy fire marshal interviewed in this study noted that had the defense attorney in the case studied known what questions to ask, “[he could have] tore up our butt.” *Id.* at 39 (brackets in original).

179. 2 F. LANE, GOLDSTEIN TRIAL TECHNIQUE § 14.23 (3d ed. 1985) (emphasis added). In the *Ake* trial, defense counsel examining the psychiatric experts missed an opportunity to establish the defendant’s mental illness at the time of the crime, apparently because of lack of familiarity with the criteria for the diagnosis of schizophrenia contained in the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders*. See Reply Brief for the Petitioner at 4 & n.3, *Ake*.

180. Similar arguments were made prior to *Gideon* in regard to the provision of counsel: What do you mean “establish that the defendant was not disadvantaged by the absence of counsel?” A record can “establish” no such thing. It can only *fail* to establish on its face that the defendant was disadvantaged. What does it prove that the record reads well? How would it have read if the defendant had had counsel? What defenses would have been raised then which are not suggested now? We don’t know and we never will. Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on “The Most Pervasive Right” of an Accused*, 30 U. CHI. L. REV. 1, 53 (1962) (emphasis in original).

181. *State v. Evans*, No. 84-199, slip op. (Tenn. Crim. App. Nov. 27, 1985). In affirming the trial court’s denial of an independent ballistics expert, the court distinguished *Ake*, *inter alia*, on the grounds that there no expert testimony had been offered on either side. “In the instant case, the State offered competent, reliable, and *unchallenged* expert evidence regarding the ballistics tests that were made.” (Emphasis added.) One might wonder how the defendant could have meaningfully challenged the ballistics evidence, in light of the trial court’s refusal to provide him with expert assistance.

182. *Grayson v. State*, 479 So. 2d 69, 72 (Ala. Crim. App. 1984), *aff’d. sub nom. Ex parte Grayson*, 479 So. 2d 76 (Ala.), *cert. denied*, 106 S. Ct. 189 (1985) (upholding the trial court’s denial of defense experts to analyze fingerprint, semen, blood, and hair evidence).

183. 470 U.S. at 83.

In deciding to leave implementation to the states, the Court noted that this is the rule for the provision of counsel. Thus the states are free to arrange a public defender program, to appoint other counsel, or to permit the indigent to choose counsel at state expense. While this system works relatively well for counsel, it is more problematic when applied to scientific experts. Lawyers, whether retained, appointed, or employed by a public defender's office, operate under an ethical standard dictating partisanship in favor of the client. While the *retained* expert will presumably, within the limits dictated by her professional standards, do the maximum to help her client attain a favorable outcome, there is no similar incentive for the expert appointed by the court without the participation of defense counsel. A court-appointed expert, while complying with the letter of *Ake*'s requirements, could conceive of her role as essentially that of a disinterested factfinder, rather than one whose job is to help the defense to the extent compatible with professional standards. Much more than in the case of counsel, therefore, the courts must consider how the identity of the scientific expert's "employer" will affect her work.<sup>184</sup>

This does not mean that the defendant has a constitutional right to "an expert who would agree to testify in accordance with his wishes."<sup>185</sup> The argument is merely that the appointed expert must be "partisan" in the sense of assisting the defense in the same way as would a retained expert. In some cases, of course, this might mean advising counsel that a given defense is untenable — but in others it could mean discovering additional defenses, of which counsel was unaware.

Clearly, the state is not required to finance a defendant's "shopping excursion for a favorable expert,"<sup>186</sup> and *Ake* makes clear that the indigent defendant has no constitutional right to an absolute choice of his own expert.<sup>187</sup> The solution, nonetheless, which would most readily guarantee respect for the defendant's due process rights — and avoid considerable litigation over the "effective assistance" of the expert<sup>188</sup> — would be to permit the defense at least a measure of partici-

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184. The question is likely to become acute in a case where the appointed expert refuses to provide the kind of assistance to which the defense believes it is entitled under *Ake*. Sallet, *supra* note 116, at 1551 n.18.

185. *Martin v. Wainwright*, 770 F.2d 918, 934 (11th Cir. 1985), *modified*, 781 F.2d 185 (11th Cir. 1986).

186. This phrase has, however, been frequently used by courts to deny the defendant his own expert where a prosecution expert has already testified on the issue. *See, e.g., Williams v. Martin*, 618 F.2d 1021, 1025 (4th Cir. 1980) (reversing district court holding that defendant's request for his own pathologist, where state pathologist had testified with "the highest degree of medical certainty," amounted to "shopping for a favorable expert witness").

187. 470 U.S. at 83.

188. *Cf., e.g., Palmer v. State*, 486 N.E.2d 477, 481-82 (Ind. 1985) (rejecting appellant's claim that his court-appointed psychiatrists did not understand the insanity defense and examined him only cursorily).



pation in the choice of the expert.<sup>189</sup> This would move the indigent defendant's situation closer to that of the defendant of means, without significant additional cost, by helping to shape the role of the expert as "employed" by the defense and thus, within limits, responsible to it.

## V. THRESHOLD SHOWING FOR ACCESS TO EXPERT SERVICES

A final problem, particularly acute when the *Ake* doctrine is extended to other kinds of experts, is that of determining *when* an expert is "necessary for an adequate defense."<sup>190</sup> In other words, at what threshold is an expert to be provided? What preliminary showing, if any, must an indigent defendant make in order to obtain the right to appointment of an expert? *Ake* sets out a "presumed need" formula, under which an expert should be granted whenever a relevant issue exists at trial. This test must be supplemented by the requirement that the defense be provided with at least the same type of expert assistance as is employed by the prosecution, as well as by ready access to a minimal level of preliminary assistance.

As the *Ake* Court noted, an expert's assistance is not necessary in all cases.<sup>191</sup> The Court thus limited its holding — in the context of the insanity defense — to cases where "a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial."<sup>192</sup> A similar formula can be applied in many other contexts.

The *Ake* formulation could be described as a "presumed need" standard, that is, one where the defendant's need for the expert is presumed once it is established that a certain issue will be a "significant factor" at trial.<sup>193</sup> Once the defendant has shown that the relevant

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189. The American Bar Association's recently adopted CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-3.3(a) (1984) calls for the states in appropriate cases to provide a mental health expert "selected by defendant." In this respect, the *Ake* opinion lags behind the ABA. It is possible to imagine various scenarios for defense participation in the choice of an expert, such as the defense choosing from a court-approved list, proposing one or more names for the court's approval, or having the right to reject one court nominee. Of course the simplest solution would be to permit the defendant to choose his expert, subject only to court control of the expert's qualifications and her fee. It is not argued, however, that this complete freedom of choice is necessarily mandated by the Constitution. *But cf.* Tague, *An Indigent's Right to the Attorney of His Choice*, 27 STAN. L. REV. 73 (1974) (arguing that an indigent should have the same right as a nonindigent to select his own counsel).

190. The language is that of the Criminal Justice Act of 1964, 18 U.S.C. § 3006A(e)(1) (1982), quoted in *Ake*, 470 U.S. at 80. The statutory term "necessary" has been interpreted to mean "reasonably necessary." *See, e.g.,* United States v. Durant, 545 F.2d 823, 827 (2d Cir. 1976); United States v. Schultz, 431 F.2d 907, 911 (8th Cir. 1970).

191. "A defendant's mental condition is not necessarily at issue in every criminal proceeding, . . . and it is unlikely that psychiatric assistance . . . would be of probable value in cases where it is not." 470 U.S. at 82.

192. 470 U.S. at 83. At another point the Court stated the condition as: "When the defendant is able to make an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense . . ." 470 U.S. at 82-83.

193. *See* Margolin & Wagner, *supra* note 17, at 664-65. Some courts and commentators have

issue exists, no further particularized showing is necessary. This standard should be a workable one in many cases (subject to a caveat concerning preliminary assistance, discussed below).<sup>194</sup> In addition to providing a psychiatrist when insanity is in issue, this standard entitles the defendant, for example, to a handwriting expert when there is a question of forgery, a pathologist if cause of death is an issue, an arson investigator concerning the cause of a fire, or a ballistics expert if the origin of a bullet is subject to dispute.<sup>195</sup>

While *Ake*'s "presumed need" test is best adapted to meet the requirements of due process in most cases, there are some situations where it would be difficult to apply. For example, defense counsel frequently needs a general criminal investigator to locate and interview witnesses and otherwise assist in the discovery of facts.<sup>196</sup> Often, it is difficult to identify specific issues from which a "presumed need" for an investigator would arise. Rather, the need for an investigator is dictated by the specific circumstances of the case. Similarly, where the defense requests the assistance of an expert whose testimony would be inadmissible at trial,<sup>197</sup> use of the "presumed need" test is difficult.

In such circumstances, there are at least two other tests to which the courts could turn for guidance. One could be called the "equal protection" test: an expert should be provided when defense counsel in similar circumstances would hire an expert for a client able to pay. Some federal courts have used such a test in applying the "necessary

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suggested that an expert should be supplied only when the issue is "pivotal," *i.e.*, when it, alone, is dispositive of guilt. *See, e.g.*, *State v. Green*, 55 N.J. 13, 18, 258 A.2d 889, 891 (1969); Note, *supra* note 35, at 148-51; *cf. Gardner, supra* note 113, at 114. While it is true that such a distinction may affect the "third prong" of the *Mathews* balancing test, Note, *supra* note 35, at 149-50, it should not do so decisively. If a given question is indeed at issue in the trial, the "third-prong" interest in accurate determination should still carry sufficient "weight," together with the individual defendant's interest, to outweigh the government's minimal fiscal interest.

194. *See* notes 216-18 *infra* and accompanying text.

195. There remains the question of what must be shown to demonstrate that a relevant issue exists. The Supreme Court has held that mere "undeveloped assertions that the requested assistance would be beneficial" are insufficient, *Caldwell v. Mississippi*, 105 S. Ct. 2633, 2637 n.1 (1985), and the Fifth Circuit has refused to read *Ake* to mean that a defendant's sanity is *always* a "significant factor" when he pleads insanity; rather, a "factual showing" that sanity is an issue must be made. *Volson v. Blackburn*, 794 F.2d 173, 176 (1986). On the other hand, it appears that courts reluctant to provide an expert may find it easy to cite boilerplate language to the effect that no showing of a real issue has been made. *See, e.g., Liles v. State*, 702 P.2d 1025, 1033-34 (Okla. Crim. App. 1985) (Bussey, J.), where the court declined to provide a defense psychiatrist on the ground that "appellant failed to show cause for doubting his sanity." 702 P.2d at 1034. The court rejected the contention that "the fact appellant was placed on psychotropic [sic] drugs at the State mental hospital [was] sufficient to raise doubts as to his mental state," declaring that "[t]his case is much different than that of *Ake* . . ." 702 P.2d at 1034. It may be noted that the same court had found in 1983 that Glen Burton Ake had "clearly failed to establish any reasonable doubt as to his sanity at the time the crimes were committed." *Ake v. State*, 663 P.2d 1, 10 (Okla. Crim. App. 1983) (Bussey, J.).

196. *See* note 103 *supra*.

197. *See* note 99 *supra*.

for an adequate defense" language of the Criminal Justice Act.<sup>198</sup> While the Supreme Court has most recently retreated from use of an equal protection approach in indigents' rights cases,<sup>199</sup> the question posed here may nonetheless help courts in their thinking about the circumstances under which an expert is required.<sup>200</sup>

The second "supplemental" test might be called the "third-prong" test, after the only real variable in the *Ake* Court's application of the *Mathews v. Eldridge* due process balancing test.<sup>201</sup> The "third prong" examines "the probable value of the [expert] assistance sought, and the risk of error in the proceeding if such assistance is not offered."<sup>202</sup> Rephrasing and simplifying slightly, one can say that an expert should be provided to the defendant where doing so would significantly increase the probability of an accurate verdict.<sup>203</sup>

In addition to the above tests, an additional standard should apply where relevant: the defense should be placed on a level of equality with the prosecution, in that it should automatically be entitled to whatever experts are used by the prosecution.<sup>204</sup> Here, the defendant would be required to make no preliminary showing at all. Rather, the "presumed need" threshold test<sup>205</sup> would be met by the prosecution's determination that an issue requiring expert assistance did exist.<sup>206</sup> Such a provision is particularly necessary because of the importance of expert assistance to the cross-examination of the prosecution experts.<sup>207</sup> For this reason, it may find special constitutional justification

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198. See, e.g., *Brinkley v. United States*, 498 F.2d 505, 510 (8th Cir. 1974); *United States v. Theriault*, 440 F.2d 713, 717 (5th Cir. 1971) (Wisdom, J., concurring), *cert. denied*, 411 U.S. 984 (1973).

199. See notes 66-73 *supra* and accompanying text.

200. "[B]oth the type of aid typically secured by defendants of means in similar cases and the amount being expended on the case by the prosecution might be viewed as evidentiary facts to be weighed in determining whether the proceeding is likely to fulfill the due process requirement of 'fairness.'" Note, *Right to Aid*, *supra* note 17, at 1075 (footnotes omitted).

201. See text at notes 41-42 *supra*.

202. *Ake*, 470 U.S. at 79. The Court disposed rather summarily of the first two factors, the private interest and the state's interest, and devoted most of its analysis to the third prong. In *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), what is here called the "third prong" was discussed second, before the discussion of the governmental interest involved. Perhaps Justice Marshall reversed the order in *Ake* in order to highlight the importance of the "risk of error" variable.

203. The favored "presumed need" standard results from application of this "third-prong" test, together with a preference for *per se* rules over a case-by-case approach. On *Ake's* adoption of a *per se* rule, and the desirability of such an approach, see note 63 *supra*.

204. Cf. Note, *Right to Aid*, *supra* note 17, at 1075, quoted at note 200 *supra*.

205. See notes 193-95 *supra* and accompanying text.

206. This test should not be construed in the reverse sense to deny the defendant an expert where the prosecution does not use one, as the defense might well need an expert which the prosecution would not otherwise employ. The best example would be that of a psychiatrist for assertion of an insanity defense in jurisdictions which place the burden of showing insanity on the defendant.

207. See *Ake*, 470 U.S. at 82. It is difficult to see how the court could deny a defense serologist in *Commonwealth v. Thacker*, No. 85-CA-34-MR, slip op. (Ky. Ct. App. Sept. 27, 1985),

in the sixth amendment's confrontation clause.<sup>208</sup> It would also apply when the prosecution presented multiple experts on an issue; the defense would be entitled to the same number.<sup>209</sup> The *Ake* Court, in fact, applied a special case of the "equality with the prosecution" rule in its secondary holding that a defendant is entitled to the assistance of a psychiatrist when the state, in the sentencing phase of a capital case, presents expert psychiatric evidence<sup>210</sup> of the defendant's future dangerousness as an aggravating factor.<sup>211</sup>

An alternate, and much simpler, system for determining when an indigent defendant is entitled to expert assistance is to leave this decision to the discretion of defense counsel, whether public defender or assigned counsel, subject perhaps to review by the court for abuse of discretion.<sup>212</sup> It has been suggested that counsel's desire to remain on good terms with the court would be sufficient to prevent excessive use of expert assistance.<sup>213</sup> Such a procedure is certainly attractive for its simplicity and especially for its potential for eliminating abuse by courts bent on denying assistance.<sup>214</sup> At the same time it might pose a danger of conflicts of interest on the part of the defense attorneys, leading to excessive self-restraint. It may be better to retain a procedure under which counsel plays the role of advocate, rather than judge.<sup>215</sup>

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where the prosecution relied on testimony of a serologist, and defense counsel "had no expertise in the field of blood groupings." The court's objection that the defense had made no "showing as to what manner counsel expected to be assisted in cross-examining the witness" is unconvincing, as it would have been difficult for counsel to make such a showing in the absence of some expert assistance. See also *State v. Evans*, No. 84-199, slip op. (Tenn. Crim. App. Nov. 27, 1985) (defense ballistics expert denied despite prosecution reliance on testimony of a ballistics expert).

208. See text at notes 80-81 *supra*. Arguably, at least this test — and perhaps the others — should also support a requirement that the state provide expert assistance for a nonindigent defendant with retained counsel, where the cost of such assistance goes beyond her means. See POVERTY AND THE ADMINISTRATION OF JUSTICE, *supra* note 3, at 7-8 (viewing "poverty" as a relative concept). Such a procedure is possible at the federal level under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A(e) (1982); see *Oaks*, *supra* note 15, at § 7.13[2] & 1986 Supplement at 229. This issue would be particularly acute when the prosecution presented numerous experts, completely overwhelming the ability of most defendants to compete on an equal footing.

209. "[I]n a contested trial . . . the number of experts may be as important as what the experts say." A. MATTHEWS, *supra* note 162, at 41.

210. As Justice Rehnquist noted in dissent, 470 U.S. at 92, the testimony regarding Ake's future dangerousness was obtained from psychiatrists (who had examined him at the state hospital in regard to present sanity) called as defense witnesses during the guilt phase.

211. 470 U.S. 83-84. Presumably, the general *Ake* rule would, in appropriate cases, entitle the defendant to expert assistance in the sentencing phase as well as the guilt phase, even where the prosecution did not activate the special rule through presentation of expert evidence.

212. See Note, *Right to Aid*, *supra* note 17, at 1077.

213. *Id.*

214. *Cf.* note 195 *supra*.

215. *Cf.* *Lane v. Brown*, 372 U.S. 477 (1963), where the Court struck down a system under which the public defender made the decision as to whether an indigent defendant could receive a trial transcript for appeal. Making counsel's decision reviewable by the court would be a partial solution, Note, *Right to Aid*, *supra* note 17, at 1077 n.125 (citing *Lane*, 372 U.S. at 486 (Harlan,

In all but the last two of the standards discussed above, some preliminary showing by the defendant is required in order to obtain access to an expert. In order to meet this threshold test, however, some preliminary assistance of an expert will often be necessary, in order to permit determination of whether a valid issue exists, whether full-scale assistance is necessary, and, if so, to prepare the motion for expert assistance.<sup>216</sup> Therefore, a threshold level of expert assistance<sup>217</sup> should be available to the indigent defendant virtually automatically.<sup>218</sup>

Finally, there is the question of how the preliminary showing is to be made. *Ake* suggests that this be done through an *ex parte* procedure,<sup>219</sup> and there are good reasons for this. A public hearing on the need for an expert witness would in effect require the defense to disclose its strategy and tactics to the prosecution. “[T]here could be no justification for such disclosure becoming an automatic discovery device for the prosecution solely because of the defendant’s indigency.”<sup>220</sup> Thus, the showing of need for an expert must be done in

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J., concurring)), but one wonders about the practicality of a system in which a defendant must ask the court to review the actions of his own counsel.

216. See Margolin & Wagner, *supra* note 17, at 663-64. Cf. Oaks, *supra* note 15, at § 7.15[3]: Courts should of course be lenient in the factual showing required [under the federal Criminal Justice Act] to establish the need for a psychiatric examination, since this is the kind of esoteric question on which a persuasive showing of need may be impossible without the aid of the medical services being sought.

See also *United States v. Crews*, 781 F.2d 826, 833 (10th Cir. 1986) (indigent defendant without a psychiatrist is handicapped in showing sufficient doubt of sanity to obtain a competency hearing).

In *State v. Campbell*, 127 N.H. 112, 498 A.2d 330, 334 (1985), the court suggested that defense counsel, in order to be able to articulate a basis for the requested assistance, “have some preliminary conversation with the expert, who can indicate such possibilities of fruitful inquiry as he then foresees.” Apparently the court did not consider the possibility that the expert might expect to be paid for such “preliminary conversation.”

217. A good model for courts to follow may be the federal Criminal Justice Act, 18 U.S.C. § 3006A(e)(2) (1982), under which up to \$150 of “threshold funds” is available to the defense counsel without prior approval. See Margolin & Wagner, *supra* note 17, at 664.

218. The American Bar Association’s CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-3.3(a) (1984) provides that in the case of a defense request for a psychiatrist to evaluate the defendant’s mental state at the time of the offense, “[t]he court should grant the defense motion as a matter of course unless the court determines that the motion has no foundation.” In a post-*Ake* case dealing with this issue, the Supreme Court of Georgia suggested that the trial court, at the defendant’s request, appoint a psychiatrist or other mental health expert “to examine the defendant in order to determine whether his sanity is likely to be a significant factor in his defense.” In case of a positive determination, the court must provide the defendant with a psychiatrist to assist in his defense. *Lindsey v. State*, 254 Ga. 444, 448-49, 330 S.E.2d 563, 566-67 (1985). Where such a procedure is followed, however, it is important that the examination be limited to determining whether or not insanity is *likely to be a significant issue*, and *not* whether the defendant was sane. Where the latter issue becomes the focus of the examination — as in *Tuggle v. Commonwealth*, 230 Va. 99, 334 S.E.2d 838, 840-41 (1985); *Satterwhite v. State*, 697 S.W.2d 503, 506 (Tex. Ct. App. 1985); or *United States v. Hansford*, No. 85-5508 (4th Cir. Feb. 27, 1986) (available on LEXIS, Genfed library, USAPP file) — the result is that a “neutral” expert decides the question (if she finds the defendant sane), thus denying the defense the “partisan” expert mandated by *Ake*. See Part IV *supra*.

219. 470 U.S. at 82-83.

220. Margolin & Wagner, *supra* note 17, at 662. Procedure under the federal Criminal Jus-

such a manner as not to inform the prosecution of defense plans which would otherwise remain confidential.

### CONCLUSION

Perhaps the most surprising fact about *Ake v. Oklahoma* is that it was decided only in 1985. Supreme Court recognition of the indigent defendant's right to the assistance of experts was long overdue. There will doubtless be further judicial battles before this right is fully realized. *Ake* dealt specifically with the right to a psychiatrist for an insanity defense, but its logic must lead to the recognition of a constitutional right, where a minimum showing of need has been made, in capital and noncapital cases alike, to the assistance as "defense consultants" of all types of experts needed to provide the "basic tools of an adequate defense."<sup>221</sup>

— John M. West

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tice Act, 18 U.S.C. § 3006A(e)(1) (1982), is for an *ex parte* hearing, but the defense attorney is not always assured that information contained in her application will be kept from the prosecution. See Oaks, *supra* note 15, at § 7.15[3]. A solution, practiced in some districts, permits counsel to request that the court seal the application materials after a decision on the application has been made. *Id.*; Margolin & Wagner, *supra* note 17, at 662-63.

221. *Ake*, 470 U.S. at 77 (quoting *Britt v. North Carolina*, 404 U.S. 226, 227 (1971)).